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IN THE

Supreme Court of the United States

October Term, 1958

No. 248

FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA, NORTH DAKOTA DIVISION, A CORPORATION,
Petitioner,

v.

WDAY, INC., A CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

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IN THE

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No. .....

FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA, NORTH DAKOTA DIVISION, A CORPORATION,

Petitioner,

v.

WDAY, INC., A CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

Farmers Educational and Cooperative Union of America, North Dakota Division, a corporation organized pursuant to the laws of the State of North Dakota, prays that a writ of certiorari issue to review a decision of the Supreme Court of North Dakota in the above case, handed down April 3, 1958, and a judgment on remittitur therefrom in the District Court of Cass County, North Dakota, made and entered May 8, 1958.

Opinion Below

The District Court handed down no opinion. The opinion of the Supreme Court of North Dakota (Appendix A, *infra*, pp. 27-47) is reported at 89 N. W. (2d) 102, but has not yet been officially reported.

Jurisdiction

The order of the Supreme Court of North Dakota, affirming a judgment of the District Court of Cass County and remanding the cause to said District Court for further proceedings according to law, was handed down on April 3, 1958. On remand, judgment for the respondent was made and entered in the District Court on May 8, 1958 (Appendix A, *infra*, pp. 48-49). Petitioner's application for extension until August 6, 1958 of time to file its petition was granted by Mr. Justice Whittaker on June 12, 1958.

The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

Questions Presented

1. Whether Section 315 of the Communications Act of 1934, 48 Stat. 1088, amended, 66 Stat. 717, 47 U. S. C. 315, relieves a radio and television station from liability for broadcasting admittedly libelous statements of a candidate for public office.

2. If so, whether such immunity from liability would extend to statements defaming a third party, not a competing candidate for office.

3. Whether, in enacting Section 315 of the Communications Act of 1934, *supra*, Congress intended to abrogate State law as to the liability of a radio and television station for broadcasting such defamatory matter.

4. If so, whether Section 315 deprives petitioner of its liberty and property, including its reputation, without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

Statute Involved

Section 315 of the Communications Act of 1934, c. 652, 48 Stat. 1064, as amended, c. 229, 50 Stat. 189 (47 U. S. C. 151 *et seq.*) reads as follows:

> "(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate.
>
> (b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.
>
> (c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section."

Statement of the Case

In the 1956 campaign for the election of a United States Senator from North Dakota there were three legally qualified candidates, Milton R. Young (Rep.), Quentin N. Burdick (Dem.) and A. C. Townley (Ind.). The respondent, WDAY, Inc., broadcast, over its radio and television facilities, campaign speeches of Young and Burdick, for which the respondent was paid. In their speeches, neither speaker mentioned either Townley or the petitioner.

After Young's and Burdick's broadcasts Townley requested an equal opportunity to use the facilities of respondent. The respondent, after examining his script, advised Townley that it believed that certain statements therein were libelous, and that it would broadcast it only if Townley so demanded under the mandate of Section 315. Townley made such demand. The respondent thereupon participated in the mechanical preparation, taping and recording of the script and film of Townley's speech, and broadcast it over respondent's radio and television facilities.

The following were among the statements so broadcast with reference to the petitioner:

> "The Farmers Union program fully carried out as planned, not as it is planned by the farmer members, but as it is planned by the Farmers Union dictators, would establish a Communist Farmers Union Soviet right here in North Dakota. . . .
>
> "Both men take orders from Communist controlled Democrat Farmers Union and now this amazing fact —Communist infiltration and power has gone so far in North Dakota that the Democratic Party supports 100% the Democratic Farmers Union candidate and the Republican Party supports 90% the Democratic Farmers Union candidate. The Communists can't lose unless the Americans wake up and wake up fast.

"Mr. Republican farmer, Republican banker, Republican businessman, do you vote and work Republican with Eisenhower for the Republican farm program and against the Farmers Union soviet or do you now still walk hand in hand with communist Farmers Union dictators. . . .

"If you do, then the jig is up and the communist Farmers Union soviet is here for sure. . . ."

Respondent has conceded that these statements were defamatory *per se*, and that they defamed the petitioner.

The complaint was served upon both defendants, and both answered. Respondent's answer asserted two defenses: (1) that Section 14-0209 of the 1953 Supplement to the North Dakota Revised Code of 1943, immunizing broadcasters from liability for defamatory statements made by persons other than themselves, absolved respondent of any liability for damages for the acts complained of; and (2) that Section 315 of the Communications Act of 1934, through its provision that the "licensee shall have no power of censorship over the material broadcast under the provisions of this section," implicitly absolved respondent of any liability to petitioner.

Petitioner demurred to both defenses.

The demurrer to respondent's first defense was sustained by the District Court on the ground that the North Dakota immunity statute was unconstitutional under both the United States and North Dakota Constitutions.[1] This

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[1] In the Conclusions of Law of the District Court the North Dakota statute was held unconstitutional under the Fourteenth Amendment and under three provisions of the State Constitution: that "every man may freely write, speak and publish his opinions on all subjects, being responsible for the abuse of this privilege" (§9); that "every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law" (§22); and that all laws of a general nature shall have uniform operation (§11) while the District Court found that this statute "unreasonably favors radio and television stations, over other forms of communication media." (Conclusions of Law on Demurrer to First Defense, ¶¶ I-V.)

decision was not appealed to the North Dakota Supreme Court.

Petitioner demurred to respondent's second defense on the grounds that Section 315 was inapplicable, that if applicable it did not grant immunity to the respondent from actions for defamation, and that if construed as granting immunity it would be unconstitutional as depriving the petitioner of its liberty and property and a substantive right to protect its property, including its reputation, without due process of law [Demurrer, ¶¶ II(a) - II(e)].

The District Court overruled petitioner's demurrer to respondent's second defense without opinion.

Neither petitioner nor respondent elected to plead further. Respondent moved for judgment in its favor for dismissal of the action. The motion was granted, and the District Court made Findings of Fact and Conclusions of Law, and ordered judgment for the respondent. The court's Conclusions of Law stated that Section 315 was applicable, that it conferred immunity upon respondent, and that as so construed it was not unconstitutional (Conclusions of Law on Demurrer to Second Defense, ¶¶ II-VI).

Petitioner appealed from this judgment to the Supreme Court of North Dakota. Its Assignments and Specifications of Errors, in addition to including general Assignments to the effect that the District Court had erred in overruling the demurrer and that the Findings of Fact, Conclusions of Law, Order for Judgment and Judgment were all contrary to law (Assignments and Specifications of Error I-VI), specifically urged that the District Court had erred in failing to find: that Section 315 was inapplicable to this case (*id.*, VIII); that Section 315 did not grant immunity to the respondent (*id.*, IX); that if it did grant such immunity Section 315 was unconstitutional in depriving petitioner of its liberty and property and a sub-

stantive right to protect its property, including its reputation, without due process of law (*id.*, X-XI); and that Section 315 did not compel or authorize the respondent to broadcast the defamatory speech in question (*id.*, XII), and did not protect or shield the respondent from liability to petitioner (*id.*, XIV).

The Supreme Court of North Dakota, in a 4-1 decision (Appendix A, pp. 27-47, *infra*), held (1) that in enacting the Communications Act of 1934 Congress had fully occupied the field of radio and television regulation; (2) that the provision of Section 315, that the station "shall have no power of censorship", did not permit the deletion of defamatory remarks; (3) that Congress could not have intended to compel a station to broadcast libelous remarks and at the same time subject it to the risk of defending actions for damages; and (4) that the importance of dissemination of information as to the character and qualification of candidates for public office gave constitutional sanction to the decision of Congress to grant immunity from defamation actions.

The minority opinion asserted that the prohibition against "censorship" in Section 315 could not be taken as absolute, as witness the recognized exceptions of obscenity and blasphemy; that whatever the rule as to defamation of opposing candidates, who may be deemed to submit to a limited privilege of comment as to their fitness for office, Congress could never have intended to forbid deletion by licensees of remarks defamatory of a third party or to deprive such party of recourse against the broadcasting station disseminating the libel.

The order of affirmance of the State Supreme Court directed that the case be "remanded to the District Court for further proceedings according to law."

On remand, the District Court on May 8, 1958, entered judgment in favor of respondent, taxing costs against the petitioner (Appendix A, pp. 48-49, *infra*).

Reasons for Granting the Writ

1. The issues presented involve Federal questions of law of great importance which have never been determined by this Court.

(a) *The Effect of the Decision Below upon Future Election Campaigns*: Section 315 applies to any legally qualified candidate for nomination or election to any political office anywhere in the United States from President to town clerk. Its interpretation must have profound effect, both on the character of political controversy throughout the country and on the rights of the individual. If Section 315 is held to permit radio and television licensees to broadcast libelous statements without liability to those defamed, the door will be open to shocking possibilities in future political campaigns. Individuals and organizations will be subject to abuse and vilification in the heat of campaigns, and be denied the protection of State law which makes the broadcaster responsible for such use of its facilities.

The decision in this case may thus shape the character of Amercian political campaigns for years to come. If the holding of the court below is allowed to stand, radio and television stations will be free from liability for making their facilities available for the vilification not only of opposing candidates but even, as here, of innocent third parties.

No matter how false and foul the libel, no matter how often it is repeated, there would be no liability of the broadcasting station. Nor is the remedy against the speaker necessarily adequate. The dissenting opinion below well said that "defamation acquires its devastating effect through dissemination rather than authorship" (Appendix A, pp. 46-47, *infra*). A defamatory broadcast may be disseminated across the country, while the speaker even if

financially responsible, may not be within the jurisdiction where the libeled person is located and presumably has suffered the greatest injury, and may not be amenable to process. Campaigning mores may thus become corrupted by a Gresham's Law of political behavior.

The significance of this danger is indicated by the magnitude of the broadcasting arena and the extent to which its facilities are increasingly being used for political purposes. For radio, "it is estimated that there now are 135 million receiving sets in the hands of the public, representing a total investment of $6.2 billion" and that there is no area in the United States where radio broadcasts cannot be received. It is likewise estimated that "some 44,500,000 television receiving sets, representing an investment of $17,000,000,000, are in the hands of the public." (Amicus Curiae Brief of National Association of Radio and Television Broadcasters in the court below, p. 5)[2]

We believe that judicial notice may be taken of the fact that radio and television have become primary media of political debate, and that this is true of local, state and national elections.[3] Whereas previously political debate took place on the platform and through the written word, and was necessarily subject to local common law and statu-

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[2] There are now 4,175 radio and television broadcasting stations, compared with 1,761 daily newspapers, in the United States. (THE WORLD ALMANAC, 1958, pp. 84, 485.) Radio and Television audiences run into many millions, dwarfing the circulation of the largest daily newspapers. The disparity is rapidly widening. (*Cf.* THE WORLD ALMANAC, 1956, pp. 484, 790.)

[3] In reply to a recent questionnaire of the National Association of Radio and Television Broadcasters, 849 of the over 4,000 broadcasting stations reported a total of 12,772 radio and television speeches by political candidates during the twelve months prior to July 1958. And it should be noted that this was a period in which there was no national and even few statewide campaigns.

tory rules respecting defamation, now the main thrust of political debate is over the air.[4]

It is thus clearly of vital concern—to political candidates, to the broadcasting industry, and to the general public—that there be a determination of the legal responsibility for disseminating defamatory statements over the air during political campaigns.

(b) *The Uncertainty as to the Meaning of Section 315*: Did Congress mean that "censorship," as used in Section 315, prevents the deletion of admittedly libelous matter? In answering this question it is important to note that defamatory matter is not protected by the Constitution. In this sense, we submit, exercising the right of deletion is not "censorship." This Court has referred, in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-72 (1942) to "narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the *libelous*, and the insulting or 'fighting' words —*those which by their very utterance inflict injury* or tend to incite to an immediate breach of the peace." (Emphasis supplied.) See also *Beauharnais* v. *Illinois*, 343 U. S. 250, 256 (1952); HOCKING, FREEDOM OF THE PRESS (1947) 122; MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) 18. Nor is it necessarily decisive that the restraint is prior rather than subsequent. *Cf. Near* v. *Minnesota*, 283 U. S. 697 (1931); *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436 (1957).

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[4] Radio and television broadcasts frequently constitute the largest item in the campaign budget, and they "have been found indispensible because they can reach large numbers of voters as nothing else can." Sarnoff, *Campaign for Campaign Money*, NEW YORK TIMES MAGAZINE, June 1, 1958, p. 12.

Even as far back as the 1940 Presidential campaign, radio appeared to be more influential than newspapers, in persuading voters. LAZARSFELD ET AL., THE PEOPLE'S CHOICE (2d ed. 1948) 125-33.

Licensed defamation does not broaden the marketplace for competitive political ideas. Slander and vilification do not contribute to the competition of conflicting ideas.[5] There is no reason to assume that Congress intended to foster competitive defamation.[6]

But even if the prohibition of "censorship" in Section 315 means that libelous matter may not be excised, it is a long jump to a holding that Congress intended to deprive a victim of broadcast defamation of his rights under State law against the broadcasting station.

The court below assumed that Congress could not have intended to deny the right to delete libel without providing immunity for the consequences. Yet liability without fault has in many situations become part of the fabric of the law,[7] particularly the law of defamation.[8] Newspapers

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[5] "A libel is not an expression of opinion, destined to stir a system of differing opinions; it is an attack, destined to bring down the stock of a fellow-man in the eyes of his neighbors and perhaps of his employer." HOCKING, FREEDOM OF THE PRESS (1947) 122.

[6] In Great Britain, Parliament has legislated to curtail the degree to which defamatory remarks in campaign speeches are privileged. The Defamation Act, 1952, 15 & 16 Geo. VI, 1 Eliz. II, c. 66, §10.

[7] See, *e.g.*, *New York Central R. R. Co.* v. *White*, 243 U. S. 188 (1917) (workmen's compensation); Mr. Justice Brandeis, dissenting, in *Crowell* v. *Benson*, 285 U. S. 22, 82 (1932); Pound, *The End of the Law as Developed in Legal Rules and Doctrines* (1914) 27 HARV. L. REV. 195, 233; Vold, *The Basis for Liability for Defamation by Radio* (1935) 19 MINN. L. REV. 611, 626-31; Vold, *Defamatory Interpolations in Radio Broadcasts* (1940) 88 U. OF PA. L. REV. 249, 251-52, 281-89. Desirable social purposes may be achieved by passing the risk of loss from the innocent victim directly or indirectly to the consumers or beneficiaries of the activity which generates the loss.

[8] Even as to this very industry, the States are split as to whether defamatory remarks beyond the broadcaster's control—*e.g.*, an ad lib interpolation—render the broadcaster liable. Compare, *e.g.*, *Sorenson* v. *Wood*, 123 Neb. 348 (1932), *appeal dismissed* sub nom. *KFAB Broadcasting Co.* v. *Sorenson*, 290 U. S. 599 (1933), and *Miles* v. *Louis Wasmer, Inc.*, 172 Wash. 466 (1933), with *Summit Hotel Co.* v. *National Broadcasting Co.*, 336 Pa. 182 (1939); and a *caveat* in 3 *Restatement of Torts* §577, comment *g*, leaves this question open.

have long been liable for defamatory publications, regardless of fault.[9] And the damage to reputation through libelous radio and television broadcasts can far exceed that suffered from newspaper publication.

A radio or television broadcaster is the gratuitous recipient of a highly valuable license, only a limited number of which can be conferred. Campaign broadcasts are a lucrative source of income to such licensees. The National Association of Radio and Television Broadcasters has estimated, in its *amicus curiae* brief in the court below, page 6, that broadcasters' revenues from the 1956 federal election campaign came to $10,000,000. Section 315 specifically states that a station is under no obligation to accept such business. It nowhere states that a station is exempt from its common law liability for damages inflicted by the libel that its facilities broadcast. It is not unreasonable to conclude that Congress intended that, should a station choose to accept such business, it, rather than those libeled, should bear the loss—or rather, as a practical matter, that it should have to pay the comparatively small premiums on insurance against such loss.[10]

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[9] "If the publication was libelous, the defendant took the risk. As was said of such matters by Lord Mansfield, 'whatever a man publishes, he publishes at his peril'." Mr. Justice Holmes, in *Peck* v. *Tribune Co.*, 214 U. S. 185, 189 (1909).

The decision below would place newspapers at a serious disadvantage vis-a-vis radio and television stations in the competition for political advertising. If the identical defamatory statement is first published in a newspaper and then broadcast in a campaign speech, the newspaper would be liable and the broadcasting station would not.

The decision below also leaves unresolved such questions as whether the immunity accorded to a campaign speech would attach to a subsequent news broadcast paraphrasing the speech or to a newspaper account reporting it.

[10] See *Coffey* v. *Midland Broadcasting Co.*, 8 F. Supp. 889 (W. D. Mo. 1934).

Had Congress declared broadcasters to be common carriers, a stronger argument for intention to immunize could be made. *Cf.*

(c) *Inability of the Federal Communications Commission to Resolve the Question*: The Federal Communications Commission itself has not adopted a settled policy as to the question under consideration.

In 1948 the Commission rendered its opinion in *Matter of Port Huron Broadcasting Co.*, 4 Pike & Fischer Radio Reg. 1, a license renewal proceeding. While the Commission approved the renewal, the majority opinion said that Section 315 gave the licensee no right to delete what it called "possibly libelous matter," and in further *obiter dicta* gratuitously implied that the licensee would be immunized from liability to the defamed persons. One of the dissenting Commissioners called these remarks "not only unnecessary to a proper decision" in the case but also "extremely dangerous" (p. 6).

A broadcaster sought to have *Port Huron* reviewed in *Houston Post Co.* v. *United States*, 79 F. Supp. 199 (S. D. Tex. 1948). Judge Hutcheson, speaking for the three-judge court, held that *Port Huron* was not a reviewable order, as its threatening language was mere dictum and could not be deemed to be a regulation of the Commission. He clearly stated his view that *Port Huron* was unauthorized and erroneous:

> "There is no body of judicial opinion interpreting [Section 315] as the Commission has done, but such opinion as there is is directly to the contrary."

He pointed out that

> "prohibitions against censorship have been uniformly held not to prevent the control of language which is beyond the scope of guarantees of free speech"

O'Brien v. *Western Union Telegraph Co.*, 113 F. (2d) 539 (C. C. A. 1st 1940). Where a carrier is compelled to accept traffic, there may be reason to assume that immunity is intended. But Congress specifically rejected a proposal to make broadcasters common carriers. 67 Cong. Rec. 12501-12503.

and added that

> "it appears from the consistent legislative history of the Communications Act not that Congress has, but that it has not, given any clear indication that in using the word 'censorship' in Sec. 315, it intended to give it the meaning and effect accorded to it by the Commission's interpretation." (79 F. Supp. 203-204)

This was said just ten years ago—August 3, 1948. During the ten years which have since gone by the question has remained unresolved.

In 1951 the Commission in *Matter of WDSU Broadcasting Company*, 7 Pike & Fischer Radio Reg. 769, renewed a license, but reiterated its *Port Huron* dictum as to deletion of libelous matter. It is noteworthy (1) that this opinion, unlike *Port Huron*, was silent as to whether the Commission regarded the broadcaster as immunized against actions for libel by the persons defamed, and (2) that neither case involved a libel of a third person, who was not a candidate.

In 1954, the Commission published a series of questions and answers on Section 315. It referred to its opinion in *Port Huron*, but, speaking of liability of broadcasters for defamation under State law, said:

> "But this is a matter which in the absence of any amendment to the law will have to be definitely decided by the courts. So far there have been no clear judicial holdings on this matter, but only dicta or lower court opinions supporting both positions." (19 Fed. Reg. 5951)

Although Section 315 itself contains a direction to the Commission to issue regulations implementing the section, the regulations merely paraphrase the statutory language and offer no guidance on the question of what types of deletions the Commission regards as censorship, and make

no reference to any immunity from actions for defamation under State law. See 47 C. F. R. 3.120, 3.290, 3.590, 3.657.[11]

The Federal Communications Commission has not been able to dispose of the problem. Guidance by this Court is badly needed.

2. The decision below, which reads into Section 315 of the Communications Act of 1934 a provision licensing stations to broadcast defamatory matter without liability, appears to conflict with the intent of Congress and with other judicial decisions.

Section 315 does not say that stations may broadcast defamatory matter without liability to the person defamed. The wholesome provision of Section 315 preventing the licensee from exercising a "power of censorship" over the material broadcast was never intended to permit the broadcasting of obscene, blasphemous or libelous statements, nor, as the Commission recognized in *Port Huron*, statements "in violation of the provisions of the Communications Act or any other Federal Law" (p. 7). Section 315 was enacted to afford rival candidates "equal opportunities" to express their views on the air waves without censorship of these views by the broadcasting station. It was not intended to give the rival candidate the opportunity not given the original speaker—or anyone else—to use the air waves to defame his opponent—or anyone else—without liability of the station. The normal role—indeed the duty—of a broadcasting station to prevent pollution of the air by blasphemous, obscene or libelous statements is not "censorship." A station performs this function for all

[11] It may also be noted that, despite its dicta in *Port Huron* and *WDSU*, the Commission appears never to have revoked or refused to renew a license because of a broadcaster's refusal to disseminate defamatory remarks in campaign speeches.

broadcasts, including broadcasts by the first political candidate.[12] Permitting subsequent speakers to broadcast libelous matter would be giving them an opportunity not accorded the original speaker. The result would not be *equal* opportunity, unless, to paraphrase Orwell's "Animal Farm", "all candidates are equal but some candidates are more equal than others."

Congress has repeatedly declined to enact such bizarre legislation. Nevertheless, the Supreme Court of North Dakota has read into the statute the language which Congress has refused to enact.

(a) *Legislative History*: Neither the Communications Act of 1934 nor its predecessor, the Radio Act of 1927, 44 Stat. 1170,[13] contains any reference to private actions for defamation or hint of any intention on the part of Congress to abrogate State Law on liability for defamation.

Although repeated attempts have been made since 1927 to persuade Congress to provide such immunity they have all failed and Congress has steadfastly refused to do so:

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[12] *Weiss* v. *Los Angeles Broadcasting Co.*, 163 F. (2d) 313 (CCA 9th, 1947), *cert. denied*, 333 U. S. 876 (1948).

[13] Section 315 of the Communications Act of 1934, as originally enacted (48 Stat. 1088) was virtually identical with §18 of the Radio Act of 1927. In so far as pertinent to the instant case, there has been no change in the law since its original enactment in 1927. See Appendix B, pp. 50-51, *infra*.

	Year	Bill	Pertinent Proposal	Disposition
1.	1927	H.R. 9971, 69th Cong., 1st Sess., §4 (Senate version) (became §18 of the Radio Act of 1927).	Licensee "shall not be liable to criminal or civil action by reason of any uncensored utterances thus broadcast".	Passed by Senate, dropped in Conference (H. Rep. 1886, 69th Cong., 2d Sess., 68 Cong. Rec. 2557, 2563).
2.	1932	H.R. 7716, 72d Cong., 2d Sess.	Revision of Radio Act of 1927, including extension of application of §18.	No immunity voted despite industry plea. Hearings before Senate Committee on Interstate Commerce on H.R. 7716, 72d Cong., 2d Sess., pp. 9-11. Passed both Houses, pocket-vetoed by Pres. Hoover.
3.	1934	S. 3285, 73d Cong., 2d Sess. (became the Communications Act of 1934).	Reenactment of §18 of Radio Act of 1927 as §315.	Industry plea for Immunity (Hearings before Senate Committee on Interstate Commerce on S. 2910, 73d Cong., 2d Sess., pp. 63-64, 66-67). House approved reenactment of §18 of Radio Act of 1927. Senate approved extension of §18 similar to that contained in H.R. 7716, 72d Cong., 2d Sess., *supra*. Neither voted for immunity. House version prevailed. H. Rep. 850, 73d Cong., 2d Sess., p. 49.
4.	1935	H.R. 9230, 74th Cong., 1st Sess.	Station not liable for defamatory speech by candidate.	Not enacted.
5.	1937	H.R. 3038, 75th Cong., 1st Sess.	Station not liable for defamatory speech by candidate.	Not enacted.

Year	*Bill*	*Pertinent Proposal*	*Disposition*
6. 1943	S. 814, 78th Cong., 1st Sess.	Station specifically permitted to delete defamatory matter.	At Committee hearings, Chairman of F. C. C. recommended and submitted proposed substitute provision: "such licensee shall not be liable for any libel, slander, invasion of right of privacy, or other similar liability imposed by any State, Federal, or any territorial law for any statement made in any broadcast pursuant to this section [unless made by the licensee or person under his control]." Hearings before Senate Committee on Interstate Commerce on S. 814, 78th Cong., 1st Sess., p. 945; see also *id.* at pp. 63-65, 162, 950-51. No committee action either on original bill or on FCC's proposed amendment.
7. 1947	S. 1333, 80th Cong., 1st Sess., §15.	"licensees shall not be liable for any libel, slander, invasion of right of privacy, or any similar liability imposed by a State, Federal, Territorial, or local law for any statement made in any" broadcast pursuant to §315 unless made by licensee or persons under his control.	Reported favorably by Senate Committee on Int. & For. Commerce (Sen. Rep. 1567, 80th Cong., 2d Sess.) p. 13, after consideration. Hearings before Sen. Committee on Int. Comm. on S. 1333, 80th Cong., 1st Sess., pp. 52, 269, 271, 277, 343, 355, 365, 431, 528, 532-33, 597-98. Not enacted.

	Year	*Bill*	*Pertinent Proposal*	*Disposition*
8.	1947	H.R. 3595, 80th Cong., 1st Sess.	"licensees shall not be liable for any libel, slander, invasion of right of privacy, or any similar liability imposed by any State, Federal, or Territorial law for any statement made in any" broadcast pursuant to §315 unless made by licensee or persons under his control.	Not enacted.
9.	1948	—	—	The question of immunity of broadcasters from liability for libel in campaign speeches was the principal subject matter of Hearings before Special Committee to Investigate FCC, pursuant to H. Res. 691, 80th Cong., 2d Sess., pp. 1-109.[14] See 1st Interim Rep., H. Rep. 2461, 80th Cong., 2d Sess. No legislation recommended.
10.	1950	H.R. 6949, 81st Cong., 1st Sess.	"licensee shall not be liable in any civil or criminal action, in any local, State, or Federal court because of any material in" a broadcast pursuant to Section 315 unless licensee wilfully participates with intent to defame.	Not enacted.

[14] In these hearings, which followed the *Port Huron* decision, *supra*, the Chairman of the F. C. C. assured the Committee that the problem of whether Section 315 forbade deletion of libelous remarks was so uncertain that for the time being no refusals to renew licenses would be based upon such action by broadcasters. Hearings before Special Committee to Investigate FCC, pursuant to H. Res. 691, 80th Cong., 2d Sess., p. 2 (1948).

	Year	*Bill*	*Pertinent Proposal*	*Disposition*
11.	1951	S. 658, 82d Cong., 1st Sess. (became 1952 Amendments to Communications Act of 1934).	General revision of Communications Act.	Conference Committee rejected House amendment providing "licensee shall not be liable in any civil or criminal action in any local, State, or Federal court because of any material in [a Section 315 broadcast unless licensee wilfully participates with intent to defame]" (98 Cong. Rec. 7401-16), in favor of Senate version, slightly amending §315 to present form but not touching on immunity. Conference Committee based decision on ground that "the proposal involves many difficult problems and * * * should be acted on only after full hearings have been held." H. Rep. 2426, 82d Cong., 2d Sess., p. 21.[15]
12.	1952	H.R. 5470, 82d Cong., 1st Sess.	"licensee shall not be liable in any civil or criminal action in any local, State, or Federal court because of any material in" a broadcast pursuant to §315 unless licensee wilfully participates with intent to defame.	Not enacted.
13.	1952	S. 2539, 82d Cong., 2d Sess.	Station shall require indemnification bond from candidate, and liability of station is limited to amount of such bond.	Not enacted.

[15] Rep. Horan, the sponsor of the immunity amendment in the House, has not re-introduced his proposal, (a) because of dubious constitutionality and (b) because it might lead to common carrier status for broadcasters. *Broadcasting*, Feb. 23, 1953, pp. 52-53.

	Year	*Bill*	*Pertinent Proposal*	*Disposition*
14.	1952	H.R. 7062, 82d Cong., 2d Sess.	"licensee shall not be liable in any civil or criminal action in any local, State, or Federal court because of any material in" a broadcast pursuant to §315 unless licensee wilfully participates with intent to defame.	Not enacted.
15.	1952	H.R. 7756, 82d Cong., 2d Sess.	"licensee shall not be liable in any civil or criminal action in any local, State, or Federal court because of any material in" a broadcast pursuant to §315 unless licensee wilfully participates with intent to defame.	Not enacted.
16.	1955	S. 1208, 84th Cong., 1st Sess.	"no licensee * * * shall be liable in any civil action in any court because of any defamatory statement made by a legally qualified candidate for public office" in a broadcast pursuant to §315 unless the licensee participates with intent to defame.	Not enacted.
17.	1955	H.R. 4814, 84th Cong., 1st Sess.	"no licensee * * * shall be liable in any civil action in any court because of any defamatory statement made by a legally qualified candidate for public office" in a broadcast pursuant to §315, unless the licensee participates with intent to defame.	Not enacted.

This impressive record shows that for more than thirty years Congress has considered the question raised in the instant case. It has repeatedly refused to enact the legislation which the Supreme Court of North Dakota has read into Section 315.

(b) *Judicial Decisions*: In 1932 the Supreme Court of Nebraska interpreted Section 18 of the predecessor Radio Act of 1928, an identical provision in so far as pertinent, precisely contrary to the decision of the court below in the instant case. The Nebraska Court held that the denial of a "power of censorship" referred only to "censoring the words as to their political or partisan trend but does not give a licensee any privilege to join and assist in the publication of a libel nor grant any immunity from the consequences of such action." *Sorenson* v. *Wood*, 123 Neb. 348 (1932). This Court dismissed an appeal from that decision. *KFAB Broadcasting Co.* v. *Sorenson*, 290 U. S. 599 (1933). Accord: *Daniell* v. *Voice of New Hampshire*, 10 Pike & Fischer Radio Reg. 2045 (Superior Ct. N. H. 1954).

This Court has held that such a conflict between the highest courts of two States in the interpretation of a federal statute is in itself a sufficient reason for granting certiorari, and did so, for example, in *Illinois* ex rel. *Gordon* v. *United States*, 328 U. S. 8, 9 (1946). See Robertson & Kirkham, The Jurisdiction of the Supreme Court of the United States (rev. ed. Wolfson & Kurland 1951) §371.

3. The decision below raises important questions of Federal-State relationships.

The common law of North Dakota, embodied in its Constitution, gives petitioner the right of action against the respondent for libel. An attempt by the State Legislature to take this right away has been held in this very case to be unconstitutional. In spite of this, because it felt that Congress had preempted the field, the Supreme Court of North Dakota has destroyed this right. To support its position, it relied upon cases in which a State had sought to control or regulate an area occupied by Congress. It cited, for example, *Allen B. Dumont Laboratories, Inc.* v. *Carroll*, 184 F. (2d) 153 (3d Cir. 1950) *cert. denied*, 340 U. S. 929 (1951) (see Appendix A, pp. 36, 37, *infra*). In that case, however, Pennsylvania had sought to regulate television programs by censorship, and thus attempted to invade a field which Congress had already occupied. Here there is no such attempt. The petitioner is claiming no rights by reason of State regulation of interstate communication. On the contrary, it is merely seeking to enforce what the dissenting opinion of the court below called "the age-old right of the individual to a reputation undefamed." (Appendix A, p. 43, *infra*.)

It is undisputed that Congress has taken over the regulation of the interstate airwaves. The question here presented is whether by so doing, it has displaced the power of the States to award damages for publishing concededly libelous matter. There has been no authoritative decision on this important question. Determination of what has been taken away from the States, and what has been left to them, should be made by the process of litigation involving specific facts. *International Assn. of Machinists* v. *Gonzales*, 356 U. S. — (1958); *International Union, United Automobile Workers* v. *Russell*, 356 U. S. — (1958).

It should also be noted that this Court has in the past upheld causes of action arising under State law, in the communications field. *Radio Station WOW* v. *Johnson*, 326 U. S. 120 (1945); *Regents of the University System of Georgia* v. *Carroll*, 338 U. S. 586 (1950).

In some States, legislation providing for immunity for broadcasters has been held invalid, principally under provisions of the State Constitutions. See Remmers, *Recent Legislative Trends in Defamation by Radio* (1951) 64 HARV. L. REV. 727, 746-47. And in the instant case, Section 315 is said to force the precise result which the North Dakota Constitution forbids.

It is respectfully submitted that this Court should determine whether the decision below improperly extends the concept of federal preemption and deprives the States of jurisdiction in an area which is peculiarly theirs. Important questions of Federal-State relationships which have never directly been passed on by this Court are involved.

4. The decision below raises a serious constitutional question.

The court below has construed Section 315 so as to exempt from liability a station which broadcasts concededly libelous remarks against a person who is not a candidate. Through this holding, the petitioner has been deprived of its common law right of redress against the station through whose facilities the libelous remarks were widely broadcast.

Thus, immunity is granted to a station to employ its facilities to broadcast defamatory remarks which in many cases are heard by millions of listeners from one end of the land to the other. The resulting damage may be incalculable. The deprivation of the right to hold the responsible party liable for such publication cannot be brushed

aside by claiming that a cause of action against the speaker still remains. Such a speaker may be amenable to process only in a far distant State, and he may be financially irresponsible.[16] Nor can it be said that criminal libel statutes give protection. Frequently, they have little deterrent value. The North Dakota statute pertaining to "slander by radio" (N. D. Rev. Code (1943) §12-2815) provides a maximum punishment of a $100 fine.[17] As a practical matter, the effect of immunizing the station may frequently deprive the victim of any effective remedy.

If Section 315 is so construed, it necessarily gives rise to a serious question of whether the victim is not being deprived, without due process of law, of substantial property rights in his reputation. *Cf. Truax* v. *Corrigan*, 257 U. S. 12 (1921). In doubtful cases a statute should be so construed as to avoid a serious constitutional issue.

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[16] The ease with which irresponsible persons may get themselves placed on the ballot in many States is illustrated by Section 16-0402 of the North Dakota Revised Code (1957 Supp.), providing that the maximum number of signatures necessary for inclusion on the primary ballot for United States Senator is 300.

[17] And since this statute refers to the victim as "him or her" it may not be applicable in the circumstances of the instant case, where a corporation was defamed.

Conclusion

In view of these considerations, the petitioner respectfully submits that this petition should be granted.

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APPENDIX A

Opinion of the Supreme Court of North Dakota

#7710
Filed April 3, 1958

STATE OF NORTH DAKOTA
IN SUPREME COURT

Farmers Educational and Cooperative Union of America, North Dakota Division a corporation,

Plaintiff and Appellant

—v—

WDAY, Inc., a corporation

Defendant and Respondent

1. Under Federal Communications Act of 1934, Title 47 USCA, Section 301, Telegraphs, Telephones and Radiotelegraphs, complete regulatory power and control over channels of interstate radio and television communication are vested in the United States exclusive of State action.

2. The inhibition against censorship imposed on broadcasting stations by Section 315, Title 47 USCA grants immunity to such stations from liability for defamatory statements made by candidates where such statements are germane to the political issues discussed by such candidates.

3. For reasons stated in the opinion it is held that Section 315, Title 47, USCA does not violate the Fifth and Fourteenth Amendments to the Constitution of the United States.

(Syllabus by the Court)

Appeal from the District Court of Cass County

Honorable John C. Pollock, Judge

AFFIRMED

Opinion of the Court by Sathre J.

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Amicus Curiae
Washington, D. C.

Farmers Educational and Cooperative Union of America, v. A. C. Townley and WDAY, Inc. a Corporation.

Sathre, J. The plaintiff is a corporation duly organized and existing under the laws of the State of North Dakota, with a principal office and place of business at Jamestown, North Dakota.

The defendant, WDAY, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of North Dakota with its office and principal place of business located at Fargo, North Dakota. It is

engaged in radio and television broadcasting from its studios at Fargo, North Dakota, under license duly issued by the Federal Communications Commission.

At the general election of North Dakota in 1956 Milton R. Young, Quentin Burdick, and A. C. Townley were duly qualified candidates for the office of United States senator.

Some time prior to October 29, 1956, two of said candidates for the office of U. S. senator, Milton R. Young and Quentin Burdick made arrangements with the defendant WDAY to use and did use its facilities and equipment for the photographing and recording of political speeches related to the respective candidates which photographic film and recordings through conventional television processes were broadcast by WDAY, the defendant.

Thereafter Townley the third candidate for U. S. Senator from North Dakota requested the same opportunity to use the broadcasting facilities and equipment of the defendant WDAY as had been accorded Milton R. Young and Quentin Burdick and presented to the defendant WDAY a script of the broadcast which he proposed to make over such facilities. WDAY notified Townley that it believed certain statements in the proposed script were false and that if such statements were, in fact false, they were libelous and that it would broadcast the proposed script only if Townley demanded that it be broadcast under the provisions of Section 315 of the Federal Communications Act, the same being Section 315 U. S. Code Annotated, Title 47.

Townley made the demand under said Section 315 and the script was broadcast through the television and radio equipment of the defendant WDAY. Among other things the script contained the following statements:

> "The Farmers Union program fully carried out as planned, not as it is planned by farmer members,

but as it is planned by the Farmers Union dictators, would establish a Communist Farmers Union Soviet right here in North Dakota."

"Both men take orders from Communist controlled Democrat Farmers Union and now this amazing fact—Communist infiltration and power has gone so far in North Dakota that the Democratic Party supports 100% the Democrat Farmers Union candidate and the Republican Party supports 90% the Democratic Farmers Union candidate. The Communist can't lose unless the Americans wake up and wake up fast."

"Mr. Republican farmer, Republican banker, Republican businessman, do you vote and work Republican with Eisenhower for the Republican farm program and against the Farmers Union Soviet or do you now still walk hand in hand with communist Farmers Union dictators."

Thereafter plaintiff brought this action against the defendants claiming that the contents of the Townley script was libelous per se and that the plaintiff thereby sustained special as well as general damages by reason of the broadcast of said script.

The complaint alleges that on the 29th day of October 1956, in the evening of said day, the defendants intentionally, wilfully, maliciously, knowingly and wrongfully published, reproduced and uttered the said libelous and defamatory statements over the television and broadcasting equipment and facilities of the defendant WDAY through channel 6, at Fargo, North Dakota; that the statements so published and broadcast by the defendants were directed to the plaintiff, and were deliberately designed to and did convey to the thousands of listeners and viewers of the

said false and defamatory matter, and visual image of the defendant A. C. Townley that the person or legal entity to whom said statements referred was the plaintiff, and did convey the impression to thousands of listeners and viewers that plaintiff was unpatriotic, guilty of treasonable conduct, violated the constitution and law of the land, and was engaged in illegal and immoral activities, and held the plaintiff up to ridicule, contempt and obloquy, and caused plaintiff to be shunned and injured in its occupation, and said statements so broadcast were libel and slander per se; that plaintiff has suffered and will suffer special damages on account of loss of membership dues and contributions in the sum of $50,000.00 and general damages in the sum of $50,000.00. The defendant A. C. Townley answered admitting making the broadcast complained of, but denied that same constituted libel and slander as against the plaintiff.

The defendant WDAY answered separately and admitted that the Townley script was broadcast through its television and broadcasting facilities; but alleged as a first defense that it was absolved of any liability for any damages under the provisions of Section 14-0209, 1953 Supp. NDRC 1943, which Section is as follows:

> "The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, by one other than such owner, licensee or operator, or agent or employee thereof."

As a second defense it alleged that under the provisions of Section 315 of the Communications Act of 1934, U. S.

Code Annotated Chapter 47, it had no power of censorship; that under said statute it was its mandatory duty to publish the script complained of, and that if it should fail to comply with said statute the same would be grounds for the Federal Communication Commission to penalize the defendant by refusing to renew its license; that by reason of the premises and said Section 315 and the regulations thereunder promulgated by the Federal Communication Commission, the defendant was without fault, and entitled to a dismissal of the action. Said Section 315 is as follows:

> "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station; PROVIDED, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate."

The plaintiff demurred to the first defense on the grounds that it did not state facts sufficient to constitute a defense, and that the said Section 14—0209 NDRC 1943, 1953 Supp. is unconstitutional, invalid and void in that it violates Section 9 and 22 of the Constitution of the State of North Dakota.

Plaintiff demurred to the second defense on the grounds that if said Section 315 of the Communications Act is applicable, it does not grant immunity to the defendant WDAY, Inc. from actions for defamation, and if construed as granting immunity, said Act would be unconstitutional and void and in violation of the Fourteenth Amendment to the Constitution of the United States and would contravene the due process clause of said Amendment, and

deprive plaintiff of a substantive right to protect its property, including its reputation; that if said Section 315 is applicable, it would be void and unconstitutional under the Fifth Amendment to the Constitution of the United States, and deprive plaintiff of liberty and property and a substantive right without due process of law; and that the answer does not state facts sufficient to constitute a defense.

On the issues thus framed the matter came on for hearing, pursuant to agreement by the parties, in the district court of the first judicial district, at Fargo, North Dakota, before the Honorable John C. Pollock, one of the judges of said district court. After such hearing the court made its order sustaining plaintiff's demurrer to the first defense of the defendant WDAY, but overruled the demurrer to the second defense.

No appearance was made for or on behalf of the defendant A. C. Townley.

Neither the plaintiff nor the defendant elected to plead further. The defendant WDAY, Inc. moved for judgment in its favor for dismissal of the action. The motion was granted and the court made findings of fact, conclusions of law, and ordered judgment in favor of the defendant WDAY for dismissal of the action. Judgment was entered accordingly. The plaintiff appealed from the judgment and demanded a trial de novo in this court.

In its order sustaining the demurrer to the first defense of the defendant WDAY the court held that Section 14-0209, 1953 Supp. NDRC 1943, was unconstitutional and void under Sections 9, 11 and 22 of the Constitution of the State of North Dakota. The defendant WDAY takes no exception to that part of the order, and therefore the question as to the constitutionality of Section 14-0209 NDRC 1943, is not before us on this appeal.

It is conceded by the defendant WDAY that the language in the Townley speech complained of by plaintiff is

libelous per se; but it claims immunity under Section 315 of the Federal Communications Act. It is contended that in the matter of the Application of Port Huron Broadcasting Co. Docket No. 6987, 1948, (4RR1) the Federal Communication Commission expressed the opinion that Section 315 relieved broadcasters from liability for defamation and that such opinion had the force of law. The proviso in Section 315 prohibits censorship of the material to be broadcast in the following language:

> "Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section."

In the Port Huron case it appears that the Broadcasting Company had adopted a policy of selling time to the various candidates for political office and had arranged to broadcast a series of talks by three candidates. But after the station management had examined the script of one of such candidates and had discovered the allegedly libelous nature of the script, broadcast thereof was refused. The Communication Commission held that suppression of the speech was a complete exercise of censorship in violation of the provisions of Section 315.

We quote the following excerpts from the text of the opinion of Communication Commission in the Port Huron case:

> "For as we read the provisions of Section 315, the prohibition contained therein against censorship in connection with political broadcasts appear clearly to constitute an occupation of the field by federal authority, which, under the law, would relieve the licensee of responsibility for any libelous matter broadcast in the course of a speech coming within Section 315 irrespective of the provisions of state law."

"Accordingly, we are of the opinion that the prohibition of Section 315 against any censorship of licensees of political speeches by candidates for office is absolute, and no exception exists in the case of material which is either libelous or might tend to involve the station in an action for damages."

"In reaching this conclusion, however, we hold merely that censorship prohibited under Section 315 of the Communications Act includes the refusal to broadcast a speech or part of a speech by a candidate for public office because of the allegedly libelous or slanderous content of the speech. Nothing in this opinion is intended to indicate that a licensee is necessarily without power to prevent the broadcast of statements or utterances in violation of the provisions of the Communications Act or any other federal law on broadcasts coming within the requirements of Section 315 of the Communications Act."

From the opinion of the Commission quoted above it is clear that the Commssion has taken the view that under Section 315 radio and television stations are obligated to offer equal opportunities to all candidates for public office to make use of their facilities without censorship. The Commission further contends that Congress has taken over the field in connection with responsibility for libelous matter as fully as it has with respect to responsibility of telegraph companies in transmitting interstate messages to the exclusion of local or state interference. Section 301 Subchapter III Provisions relating to Radio USCA Title 47 provides:

"It is the purpose of this chapter, among other things, to maintain the control of the United States

over the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." • • •

In the case of Dumont v. Carroll, 184 Fed. 2d, 153, U. S. Circuit Court of Appeals, third Circuit, (Pa) 1950 had under consideration a Pennsylvania statute, 4 P. S. Sec. 41-58 under which the Board of Censors of the state had promulgated a regulation authorizing it to censor films used by plaintiffs in projecting television programs in the State of Pennsylvania. The court below found that the regulation was in conflict with federal authority in a field fully occupied by Congress when it enacted the Radio Act of 1927, 44 Stat. 1162, and the Communications Act of 1934, 47 U. S. C. A. et seq., and found the regulation invalid. It was found that the television programs broadcast by the plaintiffs were received by persons having television sets not only in Pennsylvania but also in the State of Delaware, Maryland, New Jersey and other states. The Circuit Court of Appeals affirmed the district court and held that:

"There is no doubt but that television broadcasting is in interstate commerce. This is inherent in its very nature."

• • •

"The Communications Act of 1934 applies to every phase of television and it is clear that Congress intended the regulatory scheme set out by it therein to be exclusive of State action. See Section 301, 47 U. S. C. A. Section 301, which recites the

purpose of the Act as inter alia, the maintenance of '* * * the control of the United States over all the channels of interstate and foreign radio transmission.'"

The opinion concludes: "We think it is clear that Congress has occupied fully the field of television regulation and that the field is no longer open to the States. Congress possessed the constitutional authority to effect this result. Hines v. Davidowitz 312 U. S. 52, 74; 61 S. Ct. 399, 85 L. Ed. 581. It follows that the Commonwealth of Pennsylvania cannot censor the films used on the programs of plaintiff's station."

In the case of Sola Electric Co. v. Jefferson Electric Co. 317 U. S. 173, the Supreme Court of the United States said:

"It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules."

* * *

"When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statutes to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield."

* * *

"The federal courts have been consistent in holding that local rules of estoppel will not be permitted to thwart the purposes of statutes of the United States."

Appendix A

See also Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co. 289, U. S. 266.

It appears clear therefore under Section 301 supra of the Radio Act and the decisions in the cases cited that the Congress has taken full control of interstate radio and television communication.

The question presented in the instant case is whether under Section 315 supra, the defendant WDAY is immune from damages for broadcasting the libelous matter contained in the speech of A. C. Townley. Said statute provides that where a licensed radio station has permitted a candidate for political office to use its facilities it must afford equal opportunities to all candidates for the same office; but "such licensee shall have no power of censorship over the material broadcast under the provisions of this section". If WDAY is immune from liability such immunity is a privilege granted by section 315, and is either an absolute privilege or a qualified privilege. 53 C. J. S. Libel and Slander, Sec. 88, page 143, defines Absolute Privilege as follows:

> "An absolutely privileged communication is one for which, by reason of the occasion on which it is made, no remedy is provided for the damages in a civil action for slander or libel. It is well settled that the law recognizes this class of communications which is so absolutely privileged that even the existence of express malice does not destroy the privilege, although there are some dicta denying the rule; and some eminent judges, in dealing with particular applications of the rule, have doubted or questioned the rationale or principle of absolutely privileged communications. As to absolutely privileged communications, a civil action for libel or slander is absolutely barred."

Appendix A

In the same volume, Section 89, pages 143-144-145 Qualified privilege is defined as follows:

> "Qualified privilege exists in a larger number of cases than does absolute privilege. It relates more particularly to private interests, and comprehends communications made in good faith, without actual malice, with reasonable or probable grounds for believing them to be true, on a subject matter in which the author of the communication has an interest, or in respect to which he has a duty, public, personal or private, either legal, judicial, political, moral, or social, made to a person having a corresponding interest or duty. Briefly stated, a qualifiedly privileged communication is a defamatory communication made on what is called an occasion of privilege without actual malice, and as to such communications there is no civil liability, regardless of whether or not the communication is libelous per se or libelous per quod."

In Section 90, page 146, same volume it is stated:

> "A communication must be published in connection with, and relevant and germane to, some matter involving the interest or duty. Notwithstanding the existence of a privileged occasion between the parties to a communication, an irrelevant defamatory statement concerning a third person having no connection whatever with the occasion is not privileged, but where a defamatory charge against a third person is inseparably connected with a privileged communication concerning another it will be protected by the privilege."

There is no ambiguity in Section 315 supra. It provides in clear and specific language that where candidates for

political office are permitted to use the facilities of a station such station "shall have no power of censorship." There are certain exceptions "and narrowly limited classes of speech, the prevention of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, and libelous and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite to an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Beauharnais v. Illinois, 343 U. S. 250, 96 L. Ed. 919, 72 S. Ct. 725.

In the instant case the defendant WDAY was required by Section 315 to permit the broadcast of the Townley speech. Power to censor the speech was denied by the clear and specific language of Section 315. We cannot believe that it was the intent of Congress to compel a station to broadcast libelous statements and at the same time subject it to the risk of defending actions for damages.

The defendant WDAY took the precaution to advise the speaker that if certain statements in the speech were false they were libelous, and unless the speaker would make a demand under Section 315, his speech would not be broadcast over defendant's facilities. The speech was broadcast only after such demand was made by the speaker.

The plaintiff objected specifically to the following and similar statements in the Townley speech as charging it with being a communistic organization:

> "Both men (Young and Burdick) take orders from the communist controlled Democrat Farmers Union."

The reference to "Communist controlled Democrat Farmers Union" is in context with the criticism by the speaker

of his two opponents. The speaker was discussing the qualifications of candidates and campaign issues in which the voting public was interested. As was said in the case of Charles Parker Co. v. Silver City Crystal Co. (Conn.) 116 A (2) 440 at page 445:

> "Any political campaign is a process of debate and appeal publicly conducted in a way to bring knowledge to the voters to assist them in making a choice on election day. It is a time honored American institution indispensable in our way of life. Courts must be careful not to permit the law of libel and slander to encroach unwarrantably upon the field of free public debate."

When Congress enacted Section 315 it recognized the convenience and necessity of the general public and its right to information relative to political issues, the qualifications of candidates for public office, and their attitude on questions of grave importance affecting the general welfare of the state and nation.

It cannot reasonably be argued with any convincing force that the election of a United States Senator is not of vital importance under our form of government. The voters are entitled to all available information as to the character and qualification of candidates for the office. Under Section 315 supra, Congress has prescribed the conditions and limitations under which broadcasting stations may permit their facilities to be used by candidates for political office. Where candidates are permitted to use the facilities of the stations, censorship by the stations of the speeches broadcast is prohibited.

Communism is a subject that is being discussed both privately and publicly by Americans and by the people of other countries. The reference to that subject in the speech challenged by the plaintiff could do no more than to put

the electorate on inquiry as to the attitude of the candidates for the United States Senate toward communism. So far as the defendant WDAY is concerned it was under compulsion to publish the speech by direct mandate of a federal statute. It had no choice other than to broadcast the speech. If the speech was libelous the plaintiff had its recourse and remedy against the author of the speech who delivered it through the facilities of the defendant WDAY.

The plaintiff contends that if said Section 315 is held to grant immunity to the defendant WDAY it would be unconstitutional and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. To this we cannot agree. Section 315 imposes a mandatory duty upon broadcasting stations to permit all candidates for the same office to use their facilities if they have permitted one candidate to use them. Since power of censorship of political broadcasts is prohibited it must follow as a corollary that the mandate prohibiting censorship includes the privilege of immunity from liability for defamatory statements made by the speakers. In fact the maxim "res ipsa loquitur" applies to the situation presented here. There is no provision in the Fifth and Fourteenth Amendments to the Constitution which prohibits Congress from either granting or denying a privilege. As we have pointed out elsewhere in the opinion, the manifest purpose of Congress in enacting Section 315 was to afford full opportunity to candidates for political office to give to the electorate and the public generally facts relative to their qualifications and fitness for the office to which they aspire.

The judgment of the district court is accordingly affirmed.

P. O. Sathre
Nels G. Johnson
Thomas J. Burke
G. Grimson, C. J.

Appendix A

Farmers Educational and Cooperative Union of America, v. A. C. Townley and WDAY, Inc. a Corporation.

Morris, J. dissenting. Radio and television broadcasting falls within the scope of federal regulatory power derived from the commerce clause of the United States Constitution. Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U. S. 266. It also seems that liability for libel in connection with broadcast or telecast transmissions also falls within the scope of that power. O'Brien v. Western Union Telegraph Co., 113 F. 2d 539. Congress, by Section 315 of the Federal Communications Act of 1934, has undertaken to regulate the use of broadcasting facilities by candidates for public office and prohibit to licensees the exercise of the power of censorship over material broadcast within the provisions of that section. The extent of that regulation and its legal consequences are matters to be determined under federal statutes in accordance with federal policy insofar as that policy has been established. Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173, 87 L. ed. 165.

To the extent that Section 315 deprives a licensee of the power of censorship over the material broadcast it insulates the licensee against liability for defamation. This is a corollary to the proviso of Section 315 because Congress has by the Communications Act undertaken to protect as well as regulate radio and television stations in the public interest. Therefore the power of censorship provided by Congress must be evaluated and construed in the light of both the public purpose sought to be served and the age-old right of the individual to a reputation undefamed. I find a somewhat analogous situation with respect to Article

I of the Amendments to the Constitution of the United States prohibiting the abridgement of freedom of speech. Even that freedom must yield to civilized society's inherent prohibitions of blasphemy, indecency and defamation. Thus words that seem unqualified must sometimes yield to qualification.

"Power of censorship" that Section 315 prohibits is the power to deny or forbid the publication in advance or to refuse to make available facilities of the licensee for such publication. Allen B. Dumont Laboratories v. Carroll, 184 F. 2d 153. Despite the positive wording of the statute this prohibition cannot under all circumstances be absolute. I do not attribute to Congress an intention to deny the right of censorship to the extent of compelling the licensee to make available to a candidate for public office its facilities for the broadcasting of obscenity or blasphemy. It follows that to the extent that censorship is not absolute, privilege under the law of libel is not absolute. Once that it is conceded that the prohibition of censorship is not absolute despite its positive language we are faced with the problem of construction that involves a determination of the intention of Congress.

A number of states have by their constitutions placed reputation within the protecting mantle of the Bill of Rights. Byers v. Meridian Printing Co., 84 Ohio St. 408, 95 N. E. 917; Osborn v. Leach, 135 N. C. 628, 47 S. E. 811, 66 L. R. A. 648; Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041, 64 L. R. A. 790, 104 Am. St. Rep. 422. See also Neafie v. Hoboken Printing & Publishing Co., 75 N. J. L. 564, 68 Atl. 146.

> "As a part of the right of personal security, the preservation of every person's good name from the vile arts of detraction is justly included. The laws of the ancients, no less than those of modern nations, made private reputation one of the objects of their protection."

Appendix A

Kent's Commentaries, 14th Ed. (Gould) Vol. II, p. 23. An intention to leave all reputations at the mercy of even a limited class of defamers should not be lightly ascribed. On the other hand justice to the individual may sometimes be forced to yield to the public good. In this instance, however, Congress in enacting Section 315 was not faced with a Hobson's choice and in construing that section neither are we.

When a person becomes a candidate for a public office he submits himself to a limited privilege on behalf of those who would comment on his fitness for office. Nevada State Journal Publishing Co. v. Henderson, 294 Fed. 60, 33 Am. Jur., Libel and Slander, Section 169, 53 C. J. S., Libel and Slander, Section 134b. This rule springs from the fact that when a person becomes a candidate for public office his reputation for honesty and integrity as well as his qualifications and fitness for the position become matters of public interest. Radio and television licensees are mediums for the broad distribution of information. I have no difficulty in concluding that Congress by the enactment of Section 315 prohibited censorship of the material broadcast under the provisions of that section on the ground that it was defamatory of a candidate for the same office who had previously been permitted to use the broadcasting station. Perhaps Congress intended to go so far as to prohibit censorship of the broadcast of matter defamatory of any candidate for the same office. But what of the innocent bystander?

The innocent bystander may stand in one of two categories depending on the relationship if any between the defamatory matter and the rest of the broadcast. A defamatory statement may be a digression from the political theme and have no connection with any opposing candidate. Surely Congress did not intend that a candidate broadcasting under the protection of Section 315 might

charge his neighbor, John Doe, with being a thief out of context and with no relation to the campaign or to opposing candidates, free of any right of the licensee to censor the defamatory statement and consequently without recourse against the disseminator on the part of the person so defamed. To that extent at least the prohibition against censorship must yield. In a second and slightly different category stands the innocent bystander whose defamation is in context and is connected by words of the broadcast with an opposing candidate. An illustration would be where a candidate is broadcasting under the provisions of Section 315 and accuses an opposing candidate of associating with thieves, one of whom is neighbor John Doe. Here again the neighbor is defamed but the defamation is by context connected with the candidate as well. This case falls within the general purview of the second illustration. The defamatory accusation that the plaintiff is Communist-controlled is connected by context with the two candidates opposing A. C. Townley, whose speech was telecast after being filmed, recorded and viewed by the employees of the defendant, WDAY, Inc. The plaintiff is an innocent third party whose reputation has been defamed under the claimed protection of the prohibition against censorship contained in Section 315. It does not appear that the public interest would be served by making the reputations of innocent third parties subject to destruction without recourse to the disseminator by an irresponsible candidate for public office broadcasting under the aegis of Section 315 or that Congress intended licensees to be rendered powerless to prevent such a result.

I am not impressed by the argument that because Townley was the primary source of the defamatory material and the licensee was merely the agency of transmission or publication Congress felt that recourse to the author afforded sufficient relief. This argument ignores the fact that def-

amation acquires its devastating effect through dissemination rather than authorship and that under the law of libel damages are awarded not for the utterance but for the effect.

My conclusion is that Section 315 does not afford the defendant, WDAY, Inc., a defense in law and that the trial court erred in overruling the demurrer to the second defense.

JAMES MORRIS

Appendix A

Judgment on Remittitur

STATE OF NORTH DAKOTA

COUNTY OF CASS

IN DISTRICT COURT—FIRST JUDICIAL DISTRICT

Farmers Education and Cooperative Union of America, North Dakota Division, a corporation,

Plaintiff,

vs.

A. C. Townley and WDAY, Inc., a corporation,

Defendant.

The plaintiff above named having appealed to the Supreme Court of the State of North Dakota from the Judgment of this Court in this action entered on the 23rd day of May, 1957, and upon appeal the Supreme Court having affirmed Judgment in all respects and the Remittitur from the Supreme Court having been filed in this Court and the Court having filed its order for Judgment herein pursuant to said Remittitur, it is now in accordance therewith,

ORDERED, ADJUDGED, AND DECREED, as follows:

I.

That the Judgment entered in this action dated the 23rd day of May, 1957, in favor of the above named defendant,

WDAY, Inc., and against the above named plaintiff be in the same as [sic] hereby affirmed in all respects.

II.

That plaintiff's complaint be in the same as [sic] hereby dismissed with prejudice and upon the merits.

III.

That the defendant, WDAY, Inc., is not liable for a claim of defamation of the plaintiff, the inhibition against censorship imposed on broadcasting stations by Section 315, Title 47, USCA, granting immunity to such stations from liability for defamatory statements made by candidates where such statements are germane to the political issues discussed by such candidates.

IV.

That the defendant, WDAY, Inc., do have and recover judgment from and against the above named plaintiff in the sum of $37.00, costs and disbursements on appeal to the Supreme Court, as taxed and allowed by the Clerk of the Court.

WITNESS, The Honorable John C. Pollack, Judge of the said District Court, and my hand and the seal of this Court this 8 day of May, 1958.

Theo. L. Hanson
Clerk of the District Court

[SEAL]

APPENDIX B

Statutory Provisions

The Radio Act of 1927, §18, 44 Stat. 1170:

SEC. 18. If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the licensing authority shall make rules and regulations to carry this provision into effect: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the authority of this paragraph. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.

The Federal Communications Act of 1934, 48 Stat. 1088:

SEC. 315. If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the Commission shall make rules and regulations to carry this provision into effect: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the authority of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.

The Federal Communications Act of 1934, as amended July 16, 1952, 66 Stat. 717, 47 U. S. C. 315:

SEC. 315. (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal oppor-

tunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate.

(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 248

FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA, NORTH DAKOTA DIVISION, A CORPORATION, PETITIONER,

v.

WDAY, INC., A CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The United States supports the petition of the Farmers Educational and Cooperative Union for certiorari in this case because of its belief that a definitive determination by this Court of the meaning and significance of Section 315 of the Communications Act of 1934, as amended, 47 U.S.C. 315, insofar as it relates to the broadcast of possibly defamatory material by legally qualified candidates for public office, will be of great value alike to the Federal Communications Commission in its enforcement of the Act, the broadcast industry, and the public at large. This case squarely pre-

sents the questions of whether the statutory prohibition against censorship of uses of radio and television broadcast facilities by legally qualified candidates extends to libelous and slanderous language or language which might reasonably be thought to be defamatory and, if so, whether the licensee is thereby rendered immune from liability under applicable state law. Resolution by this Court of these questions would dispel the uncertainties which have existed as the result of differing interpretations by various state and lower federal courts. Such resolution is particularly needed in view of the increasing use of broadcast facilities by candidates for public office.

The Commission has, at least within the last ten years, consistently taken the position that the censorship prohibition in Section 315 precludes any deletion by a station licensee of material in a broadcast by a legally qualified candidate for public office because of its possible or even probable defamatory nature. See *Port Huron Broadcasting Co. (WHLS)*, 12 F.C.C. 1069 (1948); *WDSU Broadcasting Corp.*, 7 Pike & Fischer, Radio Regulation 769 (1951); *Use of Broadcast Facilities by Candidates for Public Office* (Public Notice) 19 F.R. 5948 (1954). The decision of the North Dakota Supreme Court here is in accord with this view. See also *Lamb* v. *Sutton*, 27 U.S.L. Week 2062 (M.D. Tenn. 1958). Cf. *Felix* v. *Westinghouse Radio Stations*, 89 F. Supp. 740 (E.D. Pa.), reversed on other grounds, 186 F. 2d 1 (C.A. 3), certiorari denied, 341 U.S. 909; *Charles Parker Co.* v. *Silver City Crystal Co.*, 142 Conn. 605, 116 A. 2d 440, 446. But contrary results have been reached in a number of state and lower federal courts. See *Sorensen* v.

Wood, 123 Neb. 348, 243 N.W. 82, appeal dismissed *sub nom. KFAB Broadcasting Co.* v. *Sorensen*, 290 U.S. 599; *Houston Post Company* v. *United States*, 79 F. Supp. 199 (S.D. Tex.) (dicta); see also *Daniell* v. *Voice of New Hampshire, Inc.*, 10 Pike & Fischer, Radio Regulation 2045 (Super. Ct., N.H. 1954). The consequence has been that great uncertainty, which can only be finally resolved by this Court, has existed in this area.

The question is an extremely important one from the standpoint of the public interest. If licensee control over a candidate's appearances is not permitted, there will undoubtedly be cases such as the instant one in which third parties as well as opposing candidates will suffer from the effects of libelous or slanderous remarks by candidates, whether or not it be determined that the station licensee is immunized from liability for the offending language. In such cases, the licensee would be powerless to prevent the very widespread dissemination of patently defamatory statements, which might significantly affect the outcome of the particular election. On the other hand, if stations can require the deletion of potentially libelous material, or even if, following the minority opinion in the North Dakota Supreme Court below, they may do so where the remarks refer to a party other than an opposing candidate, considerable information will undoubtedly be withheld from the voting public. For if a station has any censorship authority in this area, it would seem clear that it could not be limited to the patently defamatory but would have to extend to matters which reasonably could be held to involve a risk of being defamatory. Yet in many cases charges which

are clearly or potentially defamatory, if untrue, may be of vital concern to the electorate. Censorship in this area can thus result in sterility of broadcast political discussion. Furthermore, an extremely difficult burden will be placed upon the Commission in resolving questions as to the reasonableness or good faith of such censorship actions by its licensees.

The question of whether liability might nevertheless be imposed where state law so provides, despite a statutory inhibition on licensee control over the contents of the broadcast, also presents policy considerations of federal-state relationships of import to the public as well as the individual licensee. It can be argued (petition for certiorari, pp. 11-12) that it is fair to impose liability without fault as the price of securing a license to engage in broadcasting. On the other hand, Section 315 of the Communications Act expressly provides that "No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate."[1] Imposition of liability upon

---

[1] The Commission has heretofore construed this provision as providing licensees with necessary discretion to determine within reasonable limits which of the numerous offices which may be contested in any given election are of such public significance as to warrant allocation of some of its limited broadcast time. It has at the same time repeatedly stated its belief that broadcast operation consistent with the statutory licensing standard of the "public interest, convenience and necessity" encompasses a reasonable amount of programming directly related to political campaigning, as well as for the discussion of other controversial issues of public importance. See *Public Service Responsibility of Broadcast Licensees*, Report by Federal Communications Commission, March 7, 1946, p. 12; *Loyola University*, 12 Pike & Fischer, Radio Regulation 1017, 1099 (1956); *Albuquerque Broadcasting Co.*, (Public Notice) 3 Pike & Fischer, Radio Regulation 1820 (1946); *Homer P. Rainey*, 11 F.C.C. 898 (1947); *E. A. Stephens, et al.*, 11 F.C.C. 61 (1945); *Report on Editorializing by Broadcast Licensees*, Pike & Fischer, 1 Radio Regulation, Part 3, p. 91:201 (1949).

censees despite their inability to protect themselves would very probably have an adverse impact upon he actual use of broadcast facilities by candidates for ffice. The limited amount of free time now afforded andidates for major office could be expected to be furher minimized, and time would be offered for sale to andidates for a substantially lesser number of offices. It is quite possible that, in such circumstances, station icensees would more and more attempt to meet their bligations in the political area (see note 1) by discussions participated in by other than the candidates themselves over whom the licensees can continue to exercise content control.[2] See *Felix* v. *Westinghouse Radio Stations*, 186 F. 2d 1 (C.A. 3), certiorari denied, 341 U.S. 909. In view of the increasing importance of radio and television in presenting candidates and their views to the voting public, the gravity of any such development is clear.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.

WARREN E. BAKER,
General Counsel,
Federal Communications Commission.

SEPTEMBER, 1958.

[2] Experience shows that the alternative of requiring candidates to post a bond indemnifying the station against any liability suffers not only from the marked increase in the cost to the candidate in securing broadcast time, but also from the unwillingness of the bonding companies to write policies unless they or the station are given definite censorship powers.

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Supreme Court of the United States

October Term, 1958

No. 248

FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA, NORTH DAKOTA DIVISION, a Corporation,

Petitioner,

v.

WDAY, Inc., a Corporation.

On Writ of Certiorari to the Supreme Court of North Dakota

BRIEF FOR PETITIONER

EDWARD S. GREENBAUM,
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(a) Congress has consistently refused to grant immunity

(b) The respondent is not immunized against the petitioner's libel claim by any Congressional "preemption" of the field of broadcasting

(c) In enacting Section 315 Congress did not abrogate state law, but left to the states the determination of the broadcaster's liability for defamation

POINT III—The holding below, particularly in its effect upon persons who are not candidates, subverts the purpose of Section 315 and the policy of the Federal Communications Act

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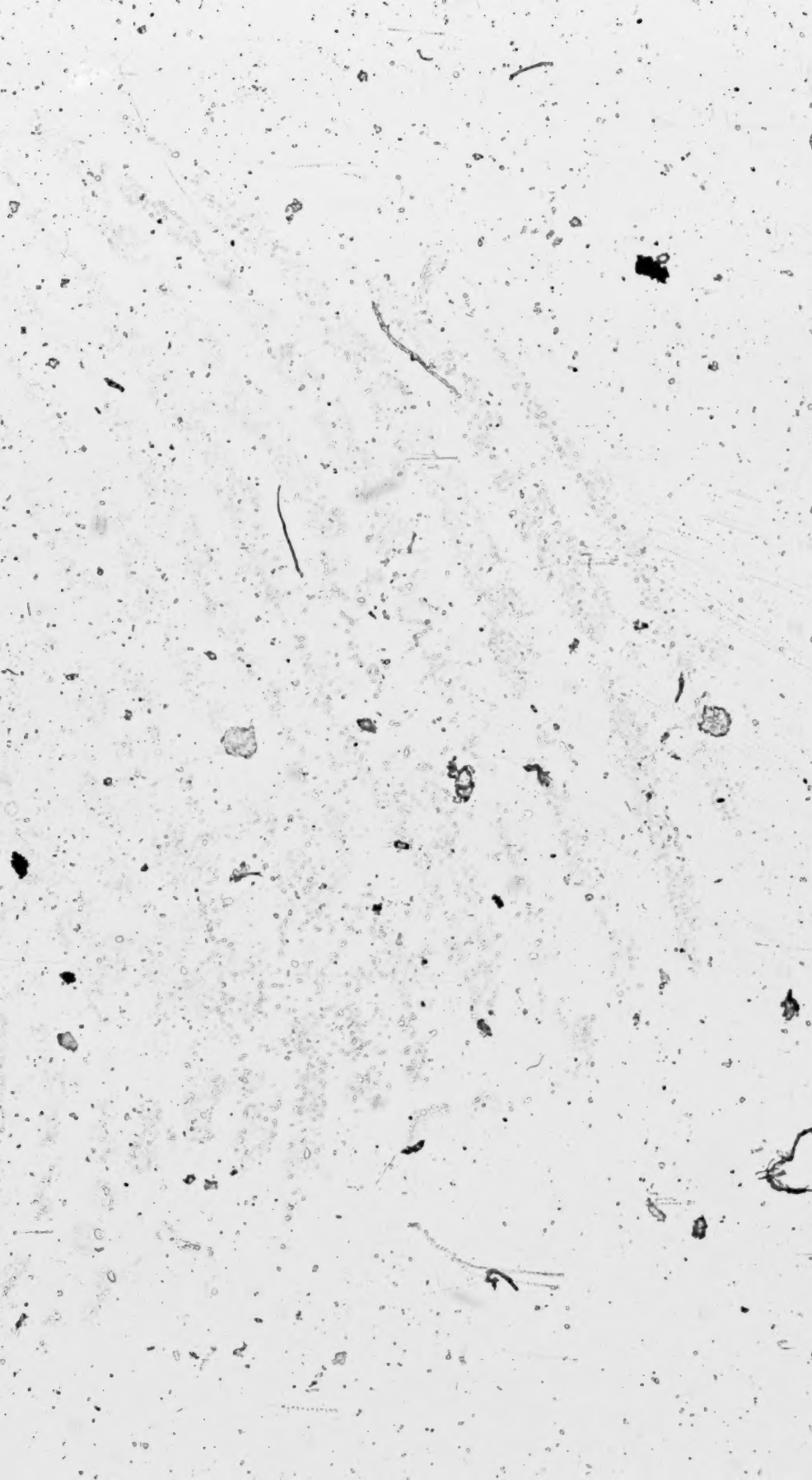
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IN THE

Supreme Court of the United States

October Term, 1958

No. 248

FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA, NORTH DAKOTA DIVISION, a Corporation,

Petitioner,

v.

WDAY, Inc., a Corporation.

On Writ of Certiorari to the Supreme Court of North Dakota

BRIEF FOR PETITIONER

Opinion Below

The District Court handed down no opinion. The opinion of the Supreme Court of North Dakota handed down April 3, 1958 (R 30) is reported at 89 N. W. (2) 102, but has not yet been officially reported.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3) in that the cause involves an assertion of immunity under a statute of the United States (Section

315 of the Communications Act of 1934, c. 652, 48 Stat. 1088, as amended; c. 229, 66 Stat. 717, 47 U. S. C. 315) and in that the cause involves the validity of the statute, as construed below, under the Fifth Amendment to the Constitution of the United States. Judgment on remittitur was entered May 8, 1958 (R 51).

The petition for a writ of certiorari was filed on August 2, 1958, after entry of an order of June 12, 1958, by Mr. Justice Whittaker granting an extension of time (R 53).

The petition was granted by order of this Court on October 13, 1958 (R 53), reported at 3 L. ed. (2) 54.

Statutes and Constitutional Provision Involved

(1) Section 315 of the Communications Act of 1934, c. 652, 48 Stat. 1088, as amended, c. 879, 66 Stat. 717, 47 U. S. C. 315:

> "(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate.
>
> "(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.
>
> "(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section."*

* For predecessor statutes see Appendix A.

(2) Section 326 of the Communications Act of 1934, c. 652, 48 Stat. 1091, as amended, c. 645, 62 Stat. 862, 47 U. S. C. 326:

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

(3) Section 414 of the Communications Act of 1934, c. 652, 48 Stat. 1099, 47 U. S. C. 414:

"Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

(4) The Fifth Amendment to the Constitution of the United States:

"No person shall * * * be deprived of life, liberty, or property, without due process of law * * *"

Questions Presented

The questions presented are:

1. Whether Section 315 of the Communications Act of 1934 required the respondent, licensee of a radio and television station, to broadcast admittedly libelous statements made by a candidate for public office;

2. If so, whether Section 315 relieves the respondent from liability for broadcasting such libelous statements;

3. If so, whether such immunity from liability extends to admittedly libelous statements defaming a third party or a competing candidate for office;

4. Whether, in enacting Section 315, Congress intended to abrogate state law as to the liability of a radio and television station for broadcasting such defamatory matter;

5. Whether Section 315, as applied, deprives petitioner of liberty and property, including its reputation, without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

Statement of the Case

On October 29, 1956 respondent, WDAY, Inc., a North Dakota corporation engaged in broadcasting radio and television programs under a license issued by the Federal Communications Commission (R. 16) broadcast a televised speech by one A. C. Townley, which contained *inter alia* the following statements about petitioner:

> "To: North Dakota Republicans, Farmers, Bankers and Businessmen
>
> "The Farmers Union program fully carried out as planned not as it is planned by the farmer members, but as it is planned by the Farmers Union Dictators, would establish a Communist Farmers Union Soviet right here in North Dakota.
>
> "This Farmers Union is now rapidly developing on your main street right here under your nose. This Farmers Union has already taken over vast business enterprise and threatens every businessman in North Dakota.
>
> "For ten years, Senator Young has used the power and prestige of the high office that he holds to serve this Farmers Union. He has not raised his voice or hand to stay the communist viper gnawing at your private ownership and liberty. On the contrary, Young says everything and does everything the Farmers union tell him to do or say—Democrat Alex Lind, Democrat Glenn Talbott, and Democrat Bill Thatcher —tell him what to say and how to vote on every matter that concerns the Farmers Union.

"In a letter to the voters dated October 10, 1956, Milton Young says, 'The Congressional Record will show that I have led the fight for 90% parity and I have letters from M. W. Thatcher thanking me.'

"Milton Young has no letter from President Eisenhower thanking him for supporting the Republican farm program because the bogus Republican, Milton Young, supports bogus Democrat farm program and gets his orders from the Democrat Farmers Union. Young is Republican in name only. His works are Communist, Democrat, Farmers Union works.

"Young and Burdick both support the Democrat Farmer program. Both men take orders from Communist controlled Democrat Farmers Union and now this amazing fact—Communist infiltration and power has gone so far in North Dakota that the Democratic Party supports 100% the Democratic Farmers Union candidate and the Republican Party supports 90% the Democratic Farmers Union candidate. The communists can't lose unless the Americans wake up and wake up fast.

"Mr. Republican farmer, Republican banker, Republican businessman, do you vote and work Republican with Eisenhower for the Republican farm program and against the Farmers Union soviet or do you now still walk hand in hand with communist Farmers Union dictators—communist Democrat Glenn Talbott, Democrat Bill Thatcher and their willing servant, Milton Young, to build this deadly tyranny.

"If you do, then the jig is up and the communist Farmer Union soviet is here for sure. I will talk over KFYR at 7:30 and KFGO at 8:30 every night this week. Also, Monday night before you vote. Please get your friends to listen." (R 18, 19)

These statements were recorded, and the speaker's image was photographed by agents and employees of the respondent, prior to the publication of the televised speech over the air waves (R 17, 18). The speech was televised over Channel No. 6, from Fargo, North Dakota, to thou-

sands of listeners and viewers in North Dakota, South Dakota and Minnesota (R 3).

It is conceded that the quoted statements so broadcast by respondent referred to petitioner, and that these statements were defamatory *per se* (R 36).

Before October 29, 1956 Townley had submitted to respondent a script containing the libelous statements above referred to. Respondent advised Townley that the script contained statements which it believed to be false and libelous. Respondent further advised Townley that it would broadcast the script only if Townley so demanded under the mandate of Section 315 of the Communications Act. After Townley made such a demand, respondent then made its facilities available to Townley and proceeded to photograph, publish, reproduce and film the speech, including the defamatory statements concerning petitioner (R 17).

At the time of the telecast of October 29, 1956, Townley was a legally qualified candidate for the United States Senate (R 16). There were also two other legally qualified candidates for that office, Milton R. Young and Quentin N. Burdick (R 16, 17). Prior to October 29, 1956, respondent had telecast speeches of Young and Burdick, and had participated in the mechanical preparation of those speeches (R 17). Neither Young nor Burdick, in their respective speeches telecast by respondent had referred to Townley or to petitioner (R 17).

Petitioner, on January 14, 1957, filed a complaint in the District Court of Cass County, North Dakota, against respondent and Townley, claiming general, special and exemplary damages on account of the preparation, publication and telecast of the libel in the amount of $150,000 (R 1). Both defendants were served (R 7, 33) and both answered (R 8, 33).

Respondent's answer asserted two defenses to both of which petitioner demurred (R 11).

Respondent's first defense asserted that Section 14-0209 of the 1953 Supplement to the North Dakota Revised Code of 1943, which purported to immunize the licensee of a broadcasting station from liability for "any defamatory statement published or uttered in or as part of a visual or sound radio broadcast by anyone other than [the] owner, licensee or operator or agent or employee thereof," absolved it from liability for its part in preparing, publishing and televising Townley's speech (R 8). The District Court of Cass County sustained petitioner's demurrer to this defense, on the ground that the North Dakota immunity statute was unconstitutional under both the United States and the North Dakota Constitutions, and also on the ground that Congress had occupied the field and had not legislated immunity[1] (R 20, 22). This ruling was not appealed to the North Dakota Supreme Court (R 35).

Respondent's second defense asserted that the speech was broadcast under the mandate of Section 315, as interpreted by the Federal Communications Commission, that Section 315 as so interpreted in *Matter of WDSU Broadcasting Company*, 7 Pike & Fischer Radio Reg. 769 (1951), required respondent to broadcast Townley's speech, and that respondent was implicitly absolved of liability to petitioner (R 9-11). Petitioner demurred to respondent's second defense on the grounds that Section 315 was in-

[1] In the Conclusions of Law of the District Court, the North Dakota statute was held unconstitutional under the Fourteenth Amendment and under three provisions of the State Constitution: that "every man may freely write, speak and publish his opinions on all subjects, being responsible for the abuse of this privilege" (§9); that "every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law (§22); and that all laws of a general nature shall have uniform operation (§11), the District Court finding being that this statute "unreasonably favors radio and television stations, over other forms of communication media." (Conclusions of Law on Demurrer to First Defense (R. 21, 22).)

applicable, that if applicable it did not grant respondent immunity from actions for defamation, and that if construed as granting immunity it would be unconstitutional as depriving the petitioner of its liberty and property and a substantive right to protect its property, including its reputation, without due process of law (R 13, 14). Petitioner's demurrer to this defense was overruled by the District Court, whose conclusions of law stated that the publication was privileged, that Section 315 granted respondent immunity and that Section 315, as so construed, was constitutional (R 22, 23).

No opinion was written by the District Court.

Neither petitioner nor respondent elected to plead further (R 24). Respondent moved for judgment in its favor for dismissal of the action (R 24). The motion was granted, and the District Court made Findings of Fact and Conclusions of Law (R 15, 24) and ordered judgment for the respondent (R 24).

Petitioner appealed from this judgment to the Supreme Court of North Dakota (R 26). Its Assignments and Specifications of Errors, in addition to including general Assignments to the effect that the District Court had erred in overruling the demurrer and that the Findings of Fact, Conclusions of Law, Order for Judgment and Judgment were all contrary to law (R 27, 28), specifically urged that the District Court had erred in failing to find: that Section 315 was inapplicable to this case (R 28); that Section 315 did not grant immunity to the respondent (R 28); that if it did grant such immunity, Section 315 was unconstitutional in depriving petitioner of its liberty and property and a substantive right to protect its property, including its reputation, without due process of law (R 28); that Section 315 did not compel or authorize the respondent to broadcast the defamatory speech in question (R 29), and did not protect or shield the respondent from liability to petitioner (R 29).

The Supreme Court of North Dakota, in a 4-1 decision (R 30) affirmed the decision of the District Court with respect to respondent's second defense. Noting that the Townley speech was conceded to be libelous *per se*, the Court relied on the opinion of the Federal Communications Commission in *Matter of Port Huron Broadcasting Co.*, 4 Pike & Fischer Radio Reg. 1 (1948), to the effect that the prohibition against censorship in Section 315 was "absolute" (R 36, 37) although the Court also quoted, with apparent approval, the statement in that opinion that the prohibition did not extend to speech in violation of the Communications Act or other federal law (R 37). Following the opinion of the Federal Communications Commission, the Court found that the prohibition of Section 315 precluded deletion of libel by respondent. The Court held that Congress had, "taken full control of interstate radio and television communication" (R 39) and that Section 315 extended to respondent a privilege to broadcast the defamatory statements (R 39, 41). The result, the Court concluded, is to confer immunity on respondent, on the ground that it was not the intent of Congress to compel a station to broadcast libel and at the same time subject it to the risk of defending actions for damages (R 41). The Court also held that this result did not violate the Fifth Amendment, in view, it said, of the importance of dissemination of information as to the character and qualifications of candidates for public office (R 42, 43).

The minority opinion (R 43) asserted that the prohibition against "censorship" in Section 315 could not be taken as absolute, as witness the recognized exceptions of obscenity and blasphemy (R 44); that whatever the rule as to defamation of opposing candidates, who may be deemed to submit to a limited privilege of comment as to their fitness for office, Congress could never have intended to

forbid deletion by licensees of remarks defamatory of a non-candidate or to deny to such a person recourse against the broadcasting station disseminating the libel (R 46, 47).

The order of affirmance of the State Supreme Court directed that the case be "remanded to the District Court for further proceedings according to law" (R 47, 48).

On remand the District Court on May 8, 1958 entered judgment in favor of respondent, taxing costs against the petitioner (R 49).

Summary of Argument

The Court below has held that petitioner has no cause of action for libel against respondent for broadcasting concededly libelous statements about petitioner over a multi-state area. This result was said to derive from the fact that the utterer of the libelous remarks was a political candidate, it being the Court's opinion that Section 315 of the Federal Communications Act relieves licensees from all liability for defamation spoken by political candidates including defamation of third persons like petitioner who are not candidates.

I

Petitioner maintains that the Court below incorrectly construed Section 315. The section does not compel radio and television stations to broadcast libel. It provides "equal opportunities" for political candidates and denies to stations the "power of censorship" over such candidates' speeches. The Supreme Court of North Dakota held that this no "censorship" provision means that the stations may not delete libel—in other words that it is a license to stations to defame not only political candidates but also third persons.

It is our contention that this holding does violence to the "equal opportunities" purpose of the section and that in no event can deletion of libel be considered "censorship" within the meaning of the section. Defamation is not within the constitutionally protected area of freedom of expression; hence it is no more "censorship" for a station to delete libel from the speech of a political candidate than it is censorship for the Federal Communications Commission to consider a station's record with respect to defamation in connection with the granting or renewal of that station's license.

The Court below rested its decision that no "censorship" means no deletion for libel on recent rulings of the Federal Communications Commission to that effect.

However, the no "censorship" proviso of Section 315 does not justify a licensee's failure to fulfill its obligation to operate in the public interest. Licensees may not broadcast obscenity, profanity, speech advocating forcible overthrow of the government, disaffection in the armed forces, and the like. Nor may they permit political candidates to violate the criminal laws of the states which forbid threats of violence, incitements to mob action, or comparable offenses. Libelous speech falls into the same category. Libel like obscenity, profanity, and other types of unlawful speech, inflicts injury by its very utterance and since it is not within the area of constitutionally protected speech, it is not "censorship" when a licensee deletes it.

II

The holding below that respondent is immune from liability for libel under state law, conflicts with the intent of Congress and ignores the clear legislative history of Section 315. Congress has consistently refused to enact any

law immunizing licensees from liability for defamation. Nor is there any sound basis for the view of the Court below that immunity must be implied from federal "preemption" of the field of radio and television. Congress has not preempted the field of defamation, and there is no warrant in either Section 315 or elsewhere in the Act to imply Congressional intention to displace state law of libel with respect to political candidates. On the contrary, Section 414 of the Act specifically states that the Act does not "in any way abridge or alter the remedies now existing at common law or by statute". Under applicable decisions of this Court, state libel law should not be held to have been displaced in the absence of an explicit expression of that purpose by Congress.

Congress, by specifically rejecting all proposals to immunize broadcasters, intended that state law should govern. Insofar as a political speech is defamatory under state law, the broadcaster who broadcast the libel, rather than the non-candidate victim of the libel, must bear the loss.

III

The result below transforms Section 315 from a statute designed to give political candidates equal rights on the air into a statute which stimulates dissemination of reckless and irresponsible attacks on non-candidates who have no right of reply. Congress did not intend that radio and television should become a medium for inflicting such injury on persons who are not candidates. The decision below leads to inequality not equality (since Section 315 applies only to answering speakers) and to competitive political defamation rather than competition of political ideas and opinion. Thus the salutary "equal opportunities" objective of Congress is distorted to debase, rather than foster, democratic processes.

IV

The construction of Section 315 adopted by the North Dakota Court would render the statute invalid under the due process clause of the Fifth Amendment. It would deprive petitioner of redress for interference with a basic right which the North Dakota Constitution protects from impairment by the state legislature. The destruction of this remedy is not supported by any valid federal objective. To subject petitioner, and other non-candidates, to such irreparable injury is so remote from the objective of equalizing opportunities among political candidates, that the result must be deemed arbitrary and capricious, and a denial of due process of law in violation of the Fifth Amendment.

ARGUMENT

POINT I

Section 315 of the Federal Communications Act does not compel radio and television stations to broadcast defamation.

In 1927 when the broadcasting industry was in its infancy, Congress provided that if any licensee permits any candidate for public office to use its facilities it must afford "equal opportunities" to all other candidates for the same office. (Sec. 18 of the Radio Act of 1927.) At the same time and in the same section, Congress also provided that licensees "shall have no power of censorship over the material broadcast under the provisions of this section." Today these provisions appear as Section 315 of the Communications Act of 1934 (c. 652, 48 Stat. 1064, as amended, c. 879, 66 Stat. 717, 47 U. S. C. 315).

The purpose of this statute was to assure that every candidate be given the opportunity to answer his opponents, on the same terms granted to them. The no "censorship" proviso was wisely included to assure that the answering candidate should not be prevented by the station from expressing his views on political matters. The statutory purpose makes it clear that the no "censorship" proviso is in implementation of the right of reply; its sole aim is to prevent the answering candidate from being put at a disadvantage. Its purpose is not to grant a privilege of libeling which is not accorded to the first speaker. And clearly it is not the purpose of this section to authorize defamation of third persons who are not candidates at all and who have no right to reply.

(a) Deletion of libel is not "censorship."

Censorship may well be defined as the deletion of something which one has a legal right to say.

In 1932 a Nebraska radio station in defending a libel suit claimed that Section 315 compelled it to broadcast libelous statements about the plaintiff, a candidate for public office. The Supreme Court of Nebraska rejected this argument. It said that the "power of censorship" provision referred only to "censoring the words as to their political or partisan trend but does not give a licensee any privilege to join and assist in the publication of a libel nor grant any immunity from the consequences of such action." *Sorenson* v. *Wood*, 123 Neb. 348 (1932) at page 354. This Court dismissed an appeal from a subsequent ruling in this case *sub nom. KFAB Broadcasting Co.* v. *Sorenson*, 290 U. S. 599 (1933). In 1954 a New Hampshire court expressed the same view in *Daniell* v. *Voice of New Hampshire*, 10 Pike & Fischer Radio Reg. 2045 (Superior Court of N. H., Merrimack County 1954).

The year after this Court dismissed the *Sorenson* appeal, and apparently in an effort to overcome the effect of that case, an attempt was made to amend the law so as to immunize broadcasters from liability for libel actions based on speeches made by political candidates. (Hearings before Senate Committee on Interstate Commerce on S. 2910, 73d Cong. 2nd Sess. pp. 63-64, 66-67.) This was defeated and Section 315 of the Act of 1934 was adopted, using language identical to its predecessor. A similar effort to include an immunity provision had been defeated when the original bill was enacted in 1927. (H. Rep. 1886, 69th Cong. 2nd Sess. 68 Cong. Rec. 2557, 2563.)

Although the law which is now Section 315 was passed in 1927, it was not until 1948—21 years later—that the Federal Communications Commission took the view that the no "censorship" provision precluded broadcasting licensees from deleting "possibly libelous matter". This view was expressed as dictum in a license renewal proceeding in which the license was renewed. *Matter of Port Huron Broadcasting Co.*, 4 Pike & Fischer Radio Reg. 1. It is on the *dicta* in this proceeding that the Court below relies for its decision in the instant case (R 36-7). In *Port Huron* the Commission also gratuitously implied that the licensee would be immune from liability to an opposing candidate who had been libelled. A dissenting Commissioner called these remarks "not only unnecessary to a proper decision" of the case but also "extremely dangerous" (p. 6).

A broadcaster sought to have *Port Huron* reviewed in *Houston Post Co.* v. *United States*, 79 F. Supp. 499 (S. D. Tex. 1948) and a three-judge court held on August 3, 1948 that *Port Huron* was not a reviewable order, as its threatening language was mere dictum and could not be deemed to be a regulation of the Commission. Speaking for the Court, Judge Hutcheson clearly stated the view that *Port Huron* was unauthorized and erroneous:

> "There is no body of judicial opinion interpreting [Section 315] as the Commission has done, but such opinion as there is is directly to the contrary." (*id.*, p. 203)

and added that

> "It appears from the consistent legislative history of the Communications Act not that Congress has, but that it has not, given any clear indication that in using the word 'censorship' in Sec. 315, it intended to give it the meaning and effect accorded to it by the Commission's interpretation." (*id.*, p. 204)

In neither *Port Huron* nor *Houston Post* was the question of libel of a non-candidate considered.

Following the decision in these cases, the question of the rights and responsibility of broadcasters regarding libel in campaign speeches was a principal subject matter of Hearings before a Special Committee to investigate the Federal Communications Commission, pursuant to H. Rep. 691, 80th Cong. 2nd Sess. At these hearings, in August of 1948, three days after the *Houston Post* case was decided, the Chairman of the Commission assured the Committee that for the time being no refusals to renew licenses would be based upon the action of a station in deleting libelous remarks (Hearings, p. 2).

The Chairman of the Committee indicated that the Committee expected the Commission not to penalize a licensee who deleted "obviously slanderous and libelous matter" and said:

> "We expect you to enforce the law as laid down by Congress in protecting the right of political candidates to express their views. But on the other hand, we are a little bit concerned, and I might say deeply concerned, in the light of this Port Huron decision, that some broadcasters may fear the loss of their licenses if they deny a candidate the right to make

what anyone would construe as libelous or slanderous statements."

He asked for assurance that

> "For the time being, at least, until the matter is settled, the honest and conscientious broadcaster who uses ordinary common sense in trying to prevent obscene or slanderous or libelous statements from going over the air need not fear any action?"

To which the Chairman of the Commission replied:

> "Any capricious action; that is right."

In *Maryland Drydock Co.* v. *NLRB*, 183 F(2) 538 (C. A. 4 1950) the Labor Board argued that it was censorship in violation of Sec. 8(c) of the National Labor Relations Act for an employer to forbid circulation on plant premises of "scurrilous and defamatory" literature published by the union. In commenting on this argument the Court, through Chief Judge Parker, said:

> "We regard this contention as so lacking in merit as hardly to warrant consideration. Freedom of speech nowhere means freedom to publish libelous and defamatory matter." (at p. 541)

He also pointed out that:

> "no censorship is involved in holding that the employer may forbid distribution on his premises of statements which are defamatory and insulting and which tend to disrupt discipline." (at p. 542)

However, in 1951, in *Matter of WDSU Broadcasting Company*, 7 Pike & Fischer Radio Reg. 769, 773, the Commission, although renewing the license of a licensee who had "in good faith" deleted libel from a candidate's

script, repeated its threat to act against licensees and declared that in the future it would

> "consider that there is no open question with respect to censorship on the part of the licensee of material broadcast under Sec. 315, and licensees will be expected to abide strictly by the provisions of that section."

This threat in the *WDSU* case is specifically pleaded as the basis of respondent's defense in this case (R 10-11) and was included by the District Court in North Dakota as a Finding of Fact (R 19-20) to support its decision in the present case. Although there was no mention of libelous statements about third persons in *WDSU* the Court below extended the Commission's doctrine and held that respondent "was under compulsion to publish the speech" (R 42).

The Court below, instead of construing the no "censorship" provision as a wholesome measure to prevent a station from censoring the political views of a candidate, as it was intended, has held it to be a command to the station to broadcast material that is concededly libelous per se (R 36) about petitioner, who is not a candidate. Nothing in the statute, the cases, nor in the Commission's rulings warrants this holding.[2]

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[2] In two state proceedings courts have suggested that because licensees have "no power of censorship" under Section 315, they may not insist upon the deletion of libel, but in neither case was this the operative ground of decision. Thus, in *Charles-Parker Co. v. Silver City Crystal Co.*, 142 Conn. 605 (1955) while adverting to the no "censorship" clause, the Connecticut court refused the plaintiff relief on the ground that the alleged libel was privileged as a matter of state law and that the speaker's privilege extended to the radio station. In *Josephson v. Knickerbocker Broadcasting Co., Inc.*, 38 N. Y. S. (2) 985 (Sup. Ct. N. Y. 1942) the New York Court found a defense based on Sec. 315 legally sufficient, but held further that in any event under state law the radio station could not be liable

b) The licensee's duty to operate in the public interest cannot be avoided by claiming deletion of objectionable matter is "censorship."

A radio or television broadcaster is the gratuitous recipient of a highly valuable license. Only a limited number of them can be granted. It is a condition of the grant that the licensee operate in the public interest, convenience and necessity. (See, *e.g.*, Sections 307, 312, and 316 of the Communications Act.)

It has never been held that the no "censorship" provision of Section 315 requires a licensee to transmit everything a candidate wishes to say. Even the Federal Communications Commission in the *Port Huron* case has stated that Section 315 does not relieve the broadcasters of their duty "to prevent the broadcast of statements or utterances in violation of the provisions of the Communications Act or any other federal law" (at p. 7). This language from the *Port Huron* opinion was quoted with approval by the Court below (R 37).

Thus neither the Commission nor the Court below consider that all deletions from the broadcasts of political candidates are "censorship." The necessity for some "censorship" is recognized by the Commission rule that a broadcaster may require an advance script of a candidate's speech without violating Section 315. (Use of Broadcast Facilities by Candidates for Public Office, Oct. 1, 1958, 23 C. C. 58-936, Public Notice 63585, Q. A. No. 48.)

Clearly it cannot be considered "censorship" for a licensee to fulfill its duty not to broadcast "obscene, in-

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a libel extemporaneously inserted after the script had been examined by the station. Cf. *Felix* v. *Westinghouse*, 89 F. S. 740 (E. D. Pa. 1950) reversed 186 F. (2) 1 (C. A. 3 1950) cert. den. 341 U. S. 909 (1951).

The decision of the North Dakota Court in this case was followed, after the Petition for Certiorari was filed herein, by the District Court for the Middle District of Tennessee, in *Lamb* v. *Sutton*, 164 F. S. 928 (1958).

decent or profane" language (18 U. S. C. §1463). This was recognized by the Court below (R 41) when it quoted from this Court's opinion in *Beauharnais* v. *Illinois*, 343 U. S. 250 (1952) at page 257:

> "Such utterances * * * are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Cf. KFKB Broadcasting Assn. Inc. v. *Federal Radio Commission*, 47 F. (2) 670 (App. D. C. 1931); *Trinity Methodist Church* v. *Federal Radio Commission*, 62 F. (2) 850 (App. D. C. 1933).

Nor can it be considered "censorship" to refuse to broadcast a speech advocating the overthrow of "any government in the United States by force or violence" (18 U. S. C. §2385) or counselling "insubordination, disloyalty, mutiny or refusal of duty by any member of the military or naval forces of the United States" (18 U. S. C. §2387) or speech violating related provisions of federal law.[3]

Section 871 of the Criminal Code (18 U. S. C. §871), makes it a crime to threaten the President. This has been

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[3] *E.g.*, statements which: obstruct justice (18 U. S. C. §1501); solicit money under false pretenses by representing it is being solicited for the use of the United States (18 U. S. C. §663); communicate or transmit defense information to a foreign government or its representative (18 U. S. C. §794); threaten an officer of the court, a juror, or a witness to a Federal criminal proceeding (18 U. S. C. §1503); threaten physical violence to persons or property in furtherance of a plan to obstruct commerce (18 U. S. C. §1951); attempt to cause insubordination in the armed forces in time of war (18 U. S. C. §2388); or statements which are false and are intended to interfere with the operation of the armed forces of the United States (*Ibid.*).

Cf. Backun v. *United States*, 112 F. (2) 635 (C. A. 4 1940) as to liability for furnishing facilities knowing that they will be used to violate a criminal statute.

held to include oral threats. (*United States* v. *Reid*, 49 F. Supp. 313 (W. D. La. 1943) aff'd 136 F. (2) 476 (C. A. 5, 1943), cert. den. 320 U. S. 775 (1943).) Obviously a candidate for office would not be permitted to broadcast a promise that, if elected, he will thrash the President.

These are some examples of speech prohibited by federal law whose excision is obviously not "censorship" within the meaning of Section 315 of the Communications Act. Clearly, the licensee has a duty to prevent broadcasts, even by political candidates, falling within any of these categories. (*Cf. Federal Communications Commission* v. *American Broadcasting Co.*, 347 U. S. 284 (1954).)

The licensee's duty to prevent unlawful speech must also extend to speech which is forbidden by state law. Thus it cannot be claimed that a licensee is required by Section 315 to broadcast speeches which the states make criminal, such as incitements to violence, or threats against persons or property, or defamatory charges against racial or religious groups (*Cf. Beauharnais* v. *Illinois, supra*).

And there is no valid basis for distinguishing criminal from civil libel for the purposes of Section 315. In most, if not all instances, the same words are the foundation for both civil and criminal liability.[4]

The line of demarcation in determining what speech a station may not broadcast and what speech is free from "censorship" must be the line adverted to by Judge Hutcheson in *Houston Post, supra*, when he said that:

> "Prohibitions against censorship have been uniformly held not to prevent the control of language which is beyond the scope of guarantees of free speech." (at p. 203)

[4] Developments in the Law of Defamation, 69 Harv. L. Rev. 875, 945 (1956); 53 C. J. S. Libel and Slander §283.

This accords with this Court's statement in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571, 572 (1942), that "There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting or fighting words—those which by their very utterance inflict injury * * *" Or as this Court put it on another occasion, obscene statements and libelous statements are "in the same class" (*Beauharnais* v. *Illinois*, *supra*, at p. 266). Quoting from its opinion in *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940) this Court reiterated in *Chaplinsky* that:

> "Resort to epithets or personal abuse is not in any sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." (at p. 572)

It has been established that libelous utterances are not "within the area of constitutionally protected speech" *Beauharnais* v. *Illinois*, *supra* (at p. 266). The deletion of such utterances cannot therefore be regarded as "censorship."

See also *Roth* v. *United States*, 354 U. S. 476 (1957); *Alberts* v. *California*, 354 U. S. 476 (1957); *Kingsley Books* v. *Brown*, 354 U. S. 436 (1957); *Near* v. *Minnesota*, 283 U. S. 697, 715 (1931); *U. S. ex rel. MSD Pub. Co.* v. *Burleson*, 255 U. S. 407, 430 (1921) (Dissenting opinion of Mr. Justice Brandeis).

The Court below construed Section 315 as a command to the stations to broadcast material prohibited by law. But, clearly, the prohibition against "censorship" does not mean that licensees may avoid their duty to operate in the public interest. What the prohibition does is to pre-

vent them from controlling the political content of material which they broadcast. Section 315 does not mean that the licensees must do something that they otherwise are not permitted to do—i.e., broadcast defamation or other unlawful matter.

(c) The Commission does not exercise the "power of censorship" in violation of Section 326 of the Federal Communications Act when it refuses to license a station which has a record of defamation.

The Commission is required to consider the qualifications of an applicant to obtain or retain a license. In doing so it is the Commission's duty to examine the applicant's record and to refuse a license to applicants who do not meet accepted standards. The station's record in broadcasting defamatory or other objectionable matter is carefully considered. This is not "censorship," and does not violate the provisions of Section 326 of the Act which states:

> "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship. * * *"

The Commission has never construed this section to prevent it from taking into account whether a licensee is guilty of defamation. It has correctly interpreted the denial of "the power of censorship" to mean no interference on its part with constitutionally protected speech—the interpretation which we contend must apply equally to Section 315.

Thus, in the *Matter of WBNX Broadcasting Co. Inc.*, 4 Pike & Fischer Radio Reg. 242, 250 (1948), the Commission said:

> "Decided cases make it clear that censorship, within the meaning of the First Amendment, consists in suppressing opinions in advance of publication * * * or in deterring expression of opinion entitled to protection of the First Amendment by threat of subsequent punishment."

From the beginning of federal control over broadcasting, the regulatory agencies have conditioned licenses on the fulfillment of the duty to prevent the facilities from being used to spread personal abuse or defamation. It has never been held that such conditioning can be regarded as "censorship". The Federal Radio Commission early enunciated this requirement, and enforced it in the *WCOT* case (*Federal Radio Commission*, Second Annual Report (1928) p. 152).

In justifying its action to prevent licensees from using their facilities for purposes of abuse and airing private disputes, the Federal Radio Commission said that no "censorship" was involved, and that:

> "* * * the constitutional guarantee of freedom of speech applies to the expression of political and religious opinions, to discussions, fair comments, and criticisms on matters of general public interest, or candidates, of men holding public office, and of political, social and economical (sic) issues." (Federal Radio Commission, Second Annual Report (1928) pp. 159, 160.)

In this instance, the Commission put a station on 30 day probation "to permit the station to continue on the air temporarily, so that it may have an opportunity to demonstrate that it is capable of a better showing."

Denial of a license renewal because defamation had been broadcast was specifically approved by the Court of Appeals for the District of Columbia in *Trinity Methodist Church* v. *Federal Radio Comm., supra.* In that case—

which has been subsequently relied on by the FCC—the Court ruled that it was not "censorship" to deny a licensee "the continued use of an instrument of commerce for such purposes" (at p. 853). On the contrary, the Court held, denial of the air waves to a licensee disseminating defamation is required in the public interest, since otherwise "this great science, instead of a boon, will become a scourge, and the nation a theater for the display of individual passions, and the collision of personal interests." Free speech (or conversely, no "power of censorship") said the Court

> "does not mean that the government * * * may not refuse a renewal of license to one who has abused it to broadcast defamatory and untrue matter." (at p. 851)

Similarly in *Independent Broadcasting Co.* v. *Federal Communications Commission*, 193 F. (2) 900 (App. D. C. 1951) the Court of Appeals sustained the denial of a license to an applicant who "was an expert in vituperation and vilification" and had been found by the Commission to have:

> "used intemperate language in his writings, sermons and broadcasts; * * * he had a constant habit of attacking the honesty and sincerity of those individuals and groups who did not agree with him * * *" (at p. 902)

There is no basis for holding that the word "censorship" as used in Section 315 of the Communications Act means something different from the word "censorship" as used in Section 326 of the same act. In the case of Section 326 the Commission, and in the case of Section 315, the licensee, may not exercise the "power of censorship". It is no more "censorship" for the Commission to

deny a license to a station because it has permitted the broadcasting of defamation than it is for the licensee to delete defamatory matter—particularly when it is directed against a third person who is not a candidate. In both cases the purpose is to assure that the station is being operated in the public interest.

POINT II

Section 315 of Federal Communications Act gives no immunity to a licensee for broadcasting a candidate's defamatory statements.

Even if it is held that the prohibition of "censorship" in Section 315 means that libelous matter may not be excised by a licensee, this is a long way from holding that Congress intended to confer on broadcasters an immunity from liability to victims of defamation.

Section 315 does not say that stations may broadcast defamatory matter without liability to the person defamed. As we have seen, Congress struck such a provision from the original Act and Congress has consistently refused to include an immunity provision (*supra*, p. 15; see also *infra*, p. 27ff). Yet the Court below has read such language into the statute and has gone to the length of giving the respondent immunity from liability for the injury that a third person, not a candidate, has sustained from the broadcast of defamatory matter that it taped, recorded, filmed and broadcast over its facilities (R 17, 18). This conclusion, the North Dakota court felt, resulted from its holding that Section 315 compelled the station to broadcast the libelous statements. The Court said "We cannot believe that it was the intent of Congress to compel a station to broadcast libelous statements and at the same

time subject it to the risk of defending actions for damages" (R 41). Instead of considering this as a reason for doubting the correctness of its holding that Section 315 compelled the broadcast of defamation, the Court chose to read into the statute the immunity provision that Congress rejected.

Thus the Court below has held that Section 315 gives a station immunity for broadcasting libelous statements about a person who is not a candidate and who has no opportunity, equal or otherwise, to reply. It construes the statute to immunize broadcasters from liability, and takes away a valuable right protected by the Constitution of North Dakota—a right which it was held in this very case could not be destroyed under state law (R 20-22). It does so in spite of the provisions of Section 414 of the Communications Act, which says:

> "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

(a) Congress has consistently refused to grant immunity.

Congress did not provide immunity in the language of Section 315 and did not intend that the broadcasters be immunized from libel claims. Congress has repeatedly declined to do exactly what the North Dakota Court says it has done. A resume of the legislative history appears in the Petition for a Writ of Certiorari (pp. 17-22).[5] It refutes the reasoning adopted by the North Dakota Court.

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[5] See also S. 1437, 85 Cong. 1st Sess. §401, which was referred to Committee in 1957 and not reported out:

> "No action, either civil or criminal, shall be maintained by any person in any court against any licensee * * * because of any defamatory statement made by a legally qualified candidate for public office in a broadcast made under the provisions of this section" unless licensee wilfully participates with intent to defame.

Section 18 of the Radio Act of 1927 contained no immunity provision. Such a provision had been passed by the Senate (H. R. 9971, 69 Cong. 1st Sess. §4; 67 Cong. Rec. 12,505) but was stricken out in conference (*supra*, p. 15).

This action, and the subsequent action of Congress in 1934, in reenacting Section 18 as Section 315 without change, negatives the idea that immunity was conferred by silence. For in the interval the Supreme Court of Nebraska had rejected in the *Sorensen* case an immunity claim based on Section 315. This case had been specifically called to the attention of Congress. (Hearings before Senate Committee on Interstate Commerce on S. 2910, 73rd Cong., 2d Sess. pp. 63-64, 66-67). Although the industry asked Congress to extend immunity when Congress made an overall revision and enacted the Communications Act in 1934, Congress took no action to overrule *Sorenson* and reenacted, as Section 315, the exact language of Section 18. [Hearings before Senate Committee on Interstate Commerce on H. R. 7716, 72d Cong., 2d Sess. pp. 9-11; Hearings before Senate Committee on Interstate Commerce on S. 2910, 73rd Cong., 2d Sess., pp. 63-64, 66-67.]

It must be concluded, therefore, that Congress felt that Section 18 had been correctly interpreted by the Nebraska Court. There is no warrant for assuming that when it enacted Section 315 in the Communications Act in 1934 Congress intended to confer an immunity which it had rejected in 1927 and which *Sorenson* said did not exist.

Ever since 1934 Congress has adhered to this position. Frequent efforts to immunize stations from defamation claims based on broadcasts by political candidates under Section 315 have failed. Congress has repeatedly said "No" to each plan for immunization.

Until the Commission made its ruling in *Port Huron* in 1948 it apparently believed that no immunity had been

granted by Congress. Thus in 1940 the Commission avoided the issue and in *Matter of Bellingham Broadcasting Co.*, 8 F. C. C. 159, (1940) said that "determination of the question of censorship involves consideration of whether the material was libelous as a matter of law • • • and whether, if libelous, a licensee possesses the legal right to expunge from a proposed broadcast a libelous statement." (p. 172)

Thereafter the Commission apparently decided that adoption of an immunity provision would be desirable. It accordingly proposed such legislation to Congress in 1943. (Hearings before Senate Committee on Interstate Commerce on S. 814, 78th Cong. 1st Sess., p. 945; *id.* at pp. 63-65, 162, 950-51.) It did not announce, as it subsequently did in 1948 in *Port Huron*, that Section 315 conferred immunity by inference. Congress turned this proposal down, and the Commission's amendment died in committee. In 1947 another immunity proposal failed to pass the Senate. (Sen. Rep. 156, 80th Cong., 2d Sess., p. 13) and a companion bill died in committee in the House (H. R. 3595, 80th Cong., 1st Sess.).

After these failures the Commission, in *Port Huron*, in 1948, changed its position and claimed that immunity was implicit in Section 315. But Congress did not accept this view. It continued to reject immunity proposals, not on the ground that Section 315 had granted immunity, as claimed by the Commission in its *Port Huron* doctrine, but because Congress disapproved of this doctrine.

Very soon after the *Port Huron* doctrine was announced, the Chairman of the Special Committee to Investigate the Federal Communications Commission, pursuant to H. R. Res. 691, 80th Congress, 2d Session, took the Commission to task for the position it had espoused in *Port Huron*. As a result the Commission withdrew from its *Port Huron* theory, and its Chairman, as we have seen,

assured the Committee that the Commission would not penalize licensees "capriciously" for deleting libel (see p. 17, *supra*).

Three years later, in 1951, the House passed an amendment to Section 315 to confer immunity, thereby indicating clearly its belief that immunity had not been granted by the statute. But the amendment was again rejected in conference (H. Rep. 2426, 82d Cong., 2d Sess., p. 21).

This action of the Conference Committee in 1951 refutes the basis for the *Port Huron* doctrine and, of course, was the opposite of acquiescence in it. Since 1951 there have been further immunity proposals;[6] none of them has been reported favorably by any committee of Congress.

The Commission in the *WDSU* case, *supra*, also in 1951, significantly omitted any assertion that Section 315 extends immunity to broadcasters. And in the Regulations promulgated by it prior to the decision of the instant case the Commission stated that "This is a matter which in the absence of any amendment to the law will have to be definitely decided by the courts." (19 Fed. Reg. 5951) In light of this legislative history there can be only one conclusion. Congress has not immunized broadcasters from liability for defamation uttered by political candidates.

(b) The respondent is not immunized against the petitioner's libel claim by any Congressional "preemption" of the field of broadcasting.

The holding below that Section 315 of the Communications Act confers immunity on stations for carrying defamation by political candidates and supersedes state law was based on the premise that Congress had "preempted the field" of communications regulation (R 38-40).

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[6] See Petition for Certiorari, pp. 20, 21; footnote 5, *supra*.

Such an argument begs the question. It assumes that Congress did intend to grant immunity from state libel laws to broadcasters. Had that been Congress' intention, it is fair to assume that it would have said so. As Mr. Justice Frankfurter said in *Bethlehem Steel Co.* v. *New York Labor Relations Board*, 330 U. S. 767 (1947): "Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the states". Accordingly, he pointed out, "Congress needs no help from generous judicial implication to achieve the supersession of state authority * * * any indulgence in construction shall be in favor of the states." (at p. 780)

Concededly federal regulation supersedes state law where the two are inconsistent. For example, when a state sought to regulate the content of television programs by requiring the prior approval of state administrative officials to the telecasting of films, the state regulation was invalid. *Allen B. Dumont Laboratories Inc.* v. *Carroll*, 184 F. (2) 153 (C. A. 3d, 1950) cert. den. 340 U. S. 929 (1950).

But Congress in Section 315 did not choose to confer immunity on licensees for broadcasting libel. As seen above (p. 27ff) it has consistently refused to do so. And the Communications Act itself (48 Stat. 1099, 47 U. S. C. Section 414) specifically states:

> "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

The "chapter" referred to is the entire Communications Act.

This section was copied verbatim from the Interstate Commerce Act. Its purpose there was to make it plain that, by giving shippers rights against carriers under fed-

eral law, Congress had not "withdrawn from the jurisdiction of the state courts * * * the whole subject of liability of carriers to shippers in interstate commerce * * * and * * * deprive(d) the state courts of their general and concurrent jurisdiction." *Pennsylvania Railroad Co.* v. *Puritan Coal Mining Co.*, 237 U. S. 121, 130 (1915). It is equally obvious that Congress did not in enacting the Federal Communications Act intend to abrogate state libel laws.

In a case interpreting Section 414, *Curran* v. *Mackay Radio and Telephone Co.*, 123 F. Supp. 83 (S.D. N.Y. 1954), it was held that an employee of a common carrier does not have a cause of action *under the Communications Act* for injuries caused by defective equipment, the use of which was a violation of the Act by the carrier. But in *dicta*, the court went on to say that Congress did not by the Communications Act intend to preempt the field of tort liability of a common carrier, so as to bar a suit by an employee of a carrier for personal injuries.

The North Dakota Supreme Court in the instant case appears to carry the occupation of the field doctrine so far as to suggest that by enacting the Communications Act Congress has preempted the entire field of liability for defamatory broadcasts. This is clearly not so. For speakers not broadcasting under Section 315, state law applies. And when the issue is narrowed to Section 315, both the legislative history and previous decisions of this Court lead to the conclusion that Congress did not, by enacting that section, intend to displace state libel law. This Court has held that state law continues in effect, despite close inter-relationship with federal regulation of communications. In *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120 (1945), a state court adjudication of fraud in the transfer of an FCC license was upheld. And in *Regents of the*

University System of Georgia v. *Carroll*, 338 U. S. 586 (1950) a state court judgment was upheld awarding damages for breach of a contract to operate a radio station, which contract the Commission had directed the licensee to abrogate as a condition of retaining its license. Certainly who retains a license to broadcast, and who actually operates a radio station, are questions far more intimately connected with the federal scheme of regulation of the airwaves than is the question whether a defamed third person may recover damages from a broadcasting station disseminating defamation by a political candidate.

Two recent cases decided by this Court are also relevant: *International Assn. of Machinists* v. *Gonzales*, 356 U. S. 617 (1958), and *International Union, UAW* v. *Russell*, 356 U. S. 634 (1958) both of which involved the Taft-Hartley Act, which certainly provides a comprehensive scheme of regulation of labor relations [*Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 480-91, 499-500 (1955)]. Yet in the *Gonzales* case this Court held that a state court may entertain a breach of contract action by a union member against the union, despite the fact that the conduct complained of was also an unfair labor practice for which specific remedies are provided under the federal statute. And the *Russell* case involved a tort action against a union for malicious interference with an employment contract, which also gave rise to a Taft-Hartley Act unfair labor practice. The Taft-Hartley Act specifically deals with the very wrongs which were the subject matter of the *Gonzales* and *Russell* actions, while in the instant case there is no provision in the Communications Act of any remedy for the tort of defamation here involved. In both *Gonzales* and *Russell* this Court emphasized that federal preemption should not be implied where the result would

be to prevent the plaintiff from securing full redress. As the Court said in *Russell* (at p. 646):

> "An employee's right to recover in the state courts, all damages caused him by this kind of tortious conduct cannot fairly be said to be pre-empted without a clearer declaration of Congressional policy than we find here".[7]

Apart from the cases, such as those discussed above, involving the validity of general rules of state law which do not purport to regulate the industry covered by federal regulation—of which the state law of libel is an example—there is also the line of cases involving direct state regulation, under the police power, of matters also subject to federal regulation. The possibilities of conflict are of course much stronger in this situation; yet under the standards applied by this Court in such cases the state rule of law survives. See, *e.g.*, *Reid* v. *Colorado*, 187 U. S. 137, 148 (1902); *Kelly* v. *Washington*, 302 U. S. 1, 10 (1937); *cf.* the standards for determining whether state action is precluded by a federal regulatory scheme set forth in *Commonwealth of Pennsylvania* v. *Nelson*, 350 U. S. 497, 502, 504, 505 (1956).

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[7] It has been suggested (Note, *The Supreme Court*, 1957 *Term*, 72 *Harv. L. Rev.* 77, 144 (1958)) that the touchstone of *Russell* and *Gonzales* was that the causes of action arose "under a state law of general application based upon an evaluation of interests not confined to labor relations." This rationale would apply even more clearly to the instant case, where the state law was the common law of libel, not confined in its application to broadcast defamation. See also Cox, *Federalism in the Law of Labor Relations*, 67 *Harv. L. Rev.* 1297, 1321-2 (1954): "If an employer were to call a union organizer a 'foreign-born Communist,' his speech would not be an unfair labor practice nor should a state be permitted to punish him for interfering with employee organization. A state court should be free nevertheless to entertain an action for damages based upon the general law of defamation."

The instant case involves a question similar to that examined in the police power cases, since the decision of the court below, if upheld, would not only prevent civil suits for libel but would also invalidate state criminal libel statutes wherever they are applicable to the broadcasting stations. As for the universality of state criminal libel laws, see *Beauharnais* v. *Illinois, supra*, at p. 255 n. 5.

As Chief Justice Marshall held in *Cohens* v. *Virginia*, 6 Wheat. 264, 443 (1821), for Congress to override state penal law "is a very serious measure, which Congress cannot be supposed to adopt lightly." Accordingly, he ruled, the Court would not find such overruling unless the Congressional intention was "clearly and unequivocally expressed" (*ibid.*).

Certainly no such intention, "clearly and unequivocally expressed" to invalidate state criminal libel laws, much less state rules of tort liability, appears in the Communications Act.

Not only has Congress specifically refused to provide immunity to the broadcasting stations under Section 315; it is equally clear that the regulatory scheme provided by Congress will not in any way be frustrated if there is no such immunity. State law has not been superseded. It must govern the instant case.

Under the relevant state law, it is clear that the respondent is liable for the defamation here involved. In this case the District Court in North Dakota held unconstitutional a state statute enacted in 1953, which purported to immunize the licensee of a broadcasting station from liability for "any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast by one other than (the) owner, licensee or operator, or agent or employee thereof." (NDRC §14-0209) (R 21, 22). The Court held that the application of this state-created immunity to the case at bar would deprive

the petitioner of its rights under the North Dakota Constitution.[8] Thus, were it not for the immunity supposedly conferred on the respondent by Section 315 on the theory that it has "preempted" the field, the petitioner would have under North Dakota law a cause of action for defamation against the respondent. We submit that Section 315 has not "preempted" this field so as to supersede the North Dakota law of defamation, which accordingly governs the rights of the parties in this case.

(c) In enacting Section 315 Congress did not abrogate state law, but left to the states the determination of the broadcaster's liability for defamation.

Congressional refusal to grant immunity to stations for broadcasting libelous statements of political candidates, leaves the question of their legal responsibility to applicable state law. In so doing, Congress recognized that this is properly a subject for local determination. The law of defamation, like the law of obscenity, is "preeminently a matter of state concern." *Alberts* v. *State of California*, 354 U. S. 476 (1957), concurring opinion of Mr. Justice Harlan at p. 502.

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[8] The North Dakota Constitution in its Declaration of Rights makes protection of reputation a fundamental right, on a plane with protection of life and liberty, as follows:

(a) Article I, Sec. 1:

"All men * * * have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation, and pursuing and obtaining safety and happiness."

(b) Article I, Sec. 9:

"Every man may freely write, speak and publish his opinions, being responsible for the abuse of that privilege."

(c) Article I, Sec. 22:

"All courts shall be open, and every man in his lands, goods, person or reputation shall have remedy by due process of law * * *"

The subject of freedom of discussion in political campaigns is not a new one. Members of Congress, from their own experience, have first-hand familiarity with it. Had they intended to enact a basically new concept when they passed the Radio Act of 1927, they would have so stated. Instead, they refused to confer immunity, thereby indicating that they intended to leave the question of liability to the gradual process of determination by the states, a process which can continue to take into account the needs and desires of state policy. This enables decisions to be made in specific cases, in light of the facts, including the actual role played by the licensee; whether, for example, as in this case, the licensee participated in the recording of the script as well as in the broadcasting of the libel. Another pertinent fact would be whether the victim was afforded the opportunity to reply or whether the victim was a candidate or, as in this case, a non-candidate with no right to reply to concededly libelous matter which the station had broadcast.

Section 315 specifically states that a station is under no obligation to accept the speeches of political candidates. As we have seen, it nowhere states that a station is exempt from its common law liability for damages inflicted by the libel that it broadcasts. Even if it be held that a station is compelled to broadcast a candidate's libelous statement, it is not unreasonable to conclude that Congress intended that the station which broadcasts the libel, rather than those libelled, should bear the loss. Campaign broadcasts are a lucrative source of income to such licensees. The brief *amicus* filed below by the National Association of Radio and Television Broadcasters, estimated broadcasters' revenue from the 1956 federal election as $10,000,000.

The station can, as a practical matter, take out insurance against such loss (*Cf. Coffey* v. *Midland Broadcasting Co.*, 8 F. Supp. 889 (W. D. Mo. 1934)) or adjust its

charges to advertisers and other consumers to spread the risk [*Cf.* Vold, *Defamatory Interpolations in Radio Broadcasts*, 88 U. Pa. L. Rev. 249 (1940)] or obtain a suitable indemnity agreement from the speaker or his sponsor.[9]

Yet the Court below assumed that Congress could not have intended to deny the right to delete libel without providing immunity. It apparently overlooked the fact that liability without fault has in many situations become part of the fabric of the law.[10] This has long been the case in the field of defamation. Newspapers, for example, have traditionally been held liable for defamatory statements regardless of fault. In *Peck* v. *Tribune Co.*, 214 U. S. 185, 189 (1909), Mr. Justice Holmes said:

> "If the publication was libelous, the defendant took the risk. As was said of such matters by Lord Mansfield, 'whatever a man publishes, he publishes at his peril'. * * *"

See also 3 Restatement of Torts, §§564, 579, 580; Harper and James, *The Law of Torts* (1956) §5.5.

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[9] Donnelly, The Right of Reply, 34 Va. L. Rev. 867 (1934); Radio, Political Speeches and The Law of Libel, 11 Fed. Bar Assoc. J. 156 (1951); Pedrick, Senator McCarthy and The Law of Libel, 48 Nw. U. L. Rev. 135 (1953).

In 1956, the National Association of Radio & Television Broadcasters published "A Political Broadcast Catechism" containing, for the guidance of broadcasters, an "Agreement Form for Political Broadcasts" which included the following language:

> "I further agree to indemnify and hold harmless the station for any damages or liability that may ensue from the performance of said broadcast."

[10] Mr. Justice Brandeis, dissenting, in *Crowell* v. *Benson*, 285 U. S. 22, 82 (1932); Pound, *The End of the Law as Developed in Legal Rules and Doctrines*, 27 Harv. L. Rev. 195, 233 (1914); Vold, *The Basis for Liability for Defamation by Radio*, 19 Minn. L. Rev. 611, 626-31 (1935); Vold, *Defamatory Interpolations in Radio Broadcasts*, 88 U. Pa. L. Rev. 249, 251-52, 281-89 (1940). Desirable social purposes may be achieved by passing the risk of loss from the innocent victim directly or indirectly to the consumers or beneficiaries of the activity which generates the loss.

Congressional determination not to destroy state remedies for defamation is consistent with historic common law protection of the reputation of the individual. It is also consistent with Congress' own declaration, specifically stated in Section 414, that nothing in the Act "shall in any way abridge or alter the remedies now existing at common law or by statute."

POINT III

The holding below, particularly in its effect upon persons who are not candidates, subverts the purpose of Section 315 and the policy of the Federal Communications Act.

Petitioner is not a "candidate for any public office": Section 315 gives it no opportunity to reply. The Court below has found that respondent broadcast a speech believed by respondent to contain false and libelous statements about petitioner (R 17) and used its equipment and facilities in photographing, filming and reproducing the speech (R 17). Nevertheless the Court below held that petitioner has no redress against respondent, although it is conceded that the language in the speech was libelous *per se* (R 36). This harsh result is based upon the Court's decision that Section 315 compelled respondent to give the broadcast (R 42) and rendered it immune from liability for defamation (R 43).

This decision requiring broadcast of libels on persons who are not candidates and who have no right to reply, in no way carries out the congressional purpose to equalize opportunities among candidates. Instead, it permits serious injury to the reputation of any person whom a candidate chooses to attack. The category of potential

victims is unlimited. There is no basis, we submit, for attributing to Congress a purpose to subject persons who are not candidates to such abuse. We submit that the dissenting opinion was clearly correct in stating:

> "It does not appear that the public interest would be served by making the reputations of innocent third parties subject to destruction without recourse to the disseminator by an irresponsible candidate for public office broadcasting (fol. 56) under the aegis of Section 315 or that Congress intended licensees to be rendered powerless to prevent such a result." (R. 46)

Moreover the effect of the decision is to create inequality, not equality, among political candidates. Instead of giving rival candidates a right equal to that given to the original speaker, it gives them greater rights. For they can require stations to broadcast defamation about their opponents or anyone else. This the first speaker cannot do.[11]

If the station is compelled to allow the broadcast of such libelous material, the entire statutory structure is distorted. Not only is there no equality but the door is opened to compel stations to participate in a gutter campaign against anybody and anything.

There is no reason to assume that Congress intended to stimulate deterioration of the mores of political debate when it sought to equalize opportunities among candidates. The public interest standard, which is the heart of the Act, has been consistently construed to require responsible and orderly administration of the air waves by the licensees and to forbid their dissemination of defamation.

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[11] *Weiss* v. *Los Angeles Broadcasting Co.*, 163 F. (2d) 313 (C. A. 9 1947) cert. den. 333 U. S. 876 (1948); *Daniell* v. *Voice of New Hampshire*, 10 Pike & Fischer Radio Reg. 2045 (Superior Court N. H., Merrimack Co. 1954).

It is fundamentally inconsistent with this standard to decide that, where political contests are involved, the air should be dedicated to dissemination of speech which flouts the laws of libel. This, however, is an inevitable result of the decision below.

As the Memorandum for the United States as *amicus curiae* submitted in support of the petition for certiorari aptly said, under the construction of the statute given by the court below "third persons as well as opposing candidates will suffer" and "In such cases, the licensee would be powerless to prevent the very widespread dissemination of patently defamatory statements, which might significantly affect the outcome of the particular election" (p. 3.) Unrestrained dissemination of libel in a political campaign does not contribute to reasoned results in elections. On the contrary, it tends to sow distrust, and to weaken the fibre of the body politic.

As this Court said in *Chaplinsky* v. *New Hampshire, supra,* at page 572.

> "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

This was quoted with approval by the Court below (R. 41).

The result of the holding that a candidate can compel a station to broadcast libel gives him the opportunity to use his broadcast time for any purpose he wishes. The FCC has stated (*Matter of WMCA*, 7 Pike & Fischer Radio Reg. 1132 (1952)) that a "use" under Section 315 need not directly aid his candidacy, nor relate to his own qualifications for office. Thus, irresponsible candidates, under the decision, can compel broadcast licensees to disseminate any kind of irrelevant, malicious abuse,

to take out any sort of grudge against any person, candidate or not.

It is true that in the "Syllabus by the Court," the Court below stated that "The inhibition against censorship imposed by Section 315" applies to statements which "are germane to the political issues discussed by such candidates" (R 31). However, the opinion is not so limited and such a view is clearly inconsistent with the spirit of the Commission's ruling in the *WMCA* case, *supra*. In any event, a test of "germaneness" would vest the stations with a real "censorship" power directly in conflict with Section 315. There are no standards available to judge what is or is not "germane". On the other hand, deletion of libel is, as we have shown, not censorship and there is an existing body of law as to what is and is not libelous. This is the type of question with which the licensees must deal every day in order to avoid liability for defamation on the one hand and to assure that they are operating in the public interest on the other.

Moreover, the decision below in no way inhibits the repetition of libel by an irresponsible candidate who may harass his victim by repeating the libel. Indeed, this is precisely what the speaker in this case has done.[12] No matter how false and foul the libel, no matter how often it is repeated, there is, under the holding, no liability of the broadcasting station. Nor is the remedy against the speaker necessarily adequate to prevent such abuse. The dissenting opinion below well said that "defamation acquires its devastating effect through dissemination rather than authorship and that under the law of libel damages are awarded not for the utterance but for the effect" (R 47).

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[12] See *National Farmers Educational and Cooperative Union of America* v. *Townley and Northern States Broadcasting*, U. S. District Court for District of North Dakota, Civil Action No. 140. Complaint filed on August 28, 1958, and based on speech made by Townley on June 18, 1958. In the broadcast complained of in the instant case Mr. Townley announced that he "will talk over KFYR at 7:30 and KFGO at 8:30 every night this week" (R 19).

A defamatory broadcast may be disseminated across the country, while the speaker, even if financially responsible, may not be within the jurisdiction where the libeled person is located and presumably has suffered the greatest injury, and the speaker may not be amenable to process.

The significance of the danger is indicated by the number of persons who can avail themselves of this use (or mis-use) of broadcasting facilities under this construction of Section 315 and by the magnitude of the broadcasting arena. According to a year-end report of the FCC the nation has more radio and television sets than it has people. There are now 150,000,000 radios and 50,000,000 T. V. receivers in the United States (N. Y. Times, January 1, 1959).

Section 315 covers all elections throughout the country at every level of government. There are over 116,000 units of government including national, state and local. (THE MUNICIPAL YEAR BOOK—1956, Chicago: The International City Managers Association, p. 13.) Many of these hold primaries as well as elections for the more than 1,000,000 candidates that are elected annually in the United States. (BAILEY, SAMUEL, AND BALDWIN, GOVERNMENT IN AMERICA, p. 241.) Many elections include not only the candidates of the two major parties but, as in the election here involved, at least one more candidate.

It is equally important to note the ease with which one may become a candidate. In North Dakota, for example, an independent candidate for the United States Senate needs only 300 signatures to qualify (Election Law Guidebook of the Senate Subcommittee on Privileges and Elections, 85th Cong., 2d Sess. 111-125 (1958)).[13] And in

[13] In Tennessee, a person can run for state office by filing a petition with 15 signatures. In 13 other states, the requirement is between 50 and 800 signatures. (Alabama, Arizona, Colorado, Delaware, Idaho, Mississippi, New Hampshire, New Jersey, Nebraska, Rhode Island, Utah, Virginia and Wyoming.) *Ibid.*, see also Comment, 57 Yale L. J. 1292 (1948).

states where write-in candidates are permitted, a person can "legaliy qualify" so as to invoke Section 315 merely by publicly announcing his candidacy (Hearings on Communications Act Amendments before Subcommittee of the House Committee on Interstate and Foreign Commerce, 84th Cong., 2d Sess. 261).

The number of elective offices throughout the country and the ease with which one may become a candidate is a tribute to our democracy. But it also indicates the huge number of candidates who are given equal opportunity rights under Section 315.

Those who are not candidates will suffer most if the interpretation of the court below is allowed to stand. As between the candidates not only is there the right of reply, but a wide latitude is permitted under state libel law. Under state law, by running for office a candidate necessarily becomes a legitimate subject of free discussion, and "public property" as this Court has put it (*Beauharnais* v. *Illinois, supra,* at p. 263, n. 18). See also 3 Restatement of Torts, Sections 606, 607 and *Abell* v. *Cornwall Industrial Corp.*, 241 N. Y. 327 (1925). Members of Congress are well aware of the importance of broadcasting in political campaigns. Their awareness of its importance was evidenced by their concern after the *Port Huron* decision was rendered (*supra,* pp. 16-17). The language of Section 315 and Congress' refusal to amend it lead to the inevitable conclusion that Section 315 was not intended to and does not, compel the broadcast of libel against a third person, nor give immunity to a station which not only circulates but participates in producing such a libel. That no such result was intended is borne out by the fact that in none of the discussions and debates was any suggestion made that the statute would license defamation of non candidates.

Opening the airways to unrestricted defamation gives a speaker access to facilities for reaching the greatest audience that has ever been addressed. It has been estimated that sixty-five million people heard President Eisenhower's talk on February 29, 1956. (N. Y. Herald Tribune, March 1, 1956.) If a candidate chooses to use television as a forum for defamation, the damage inflicted is immeasurable. It can never be undone. Many irresponsible persons can become "candidates" and, under the construction of Section 315 adopted by the North Dakota Court, use radio and television to spread defamation which could not be otherwise published in any other media of communication.

The same considerations which make it against the public interest to publish libel in newspapers apply with equal—or even greater—force with regard to broadcasts over radio and television. Presumably, newspapers and other media, would be liable for the publication of the identical defamatory statements that licensees of broadcasting stations could make with impunity under the decision of the Court below. Yet the result of the decision of the Court below is that libel by radio and television, which does the most damage, must be broadcast. The decision below compels the broadcaster to commit an act which in all other contexts is illegal. When Congress forbade "censorship" of campaign speeches it did not intend to accomplish such bizarre results.[14]

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[14] Moreover, the decision below leaves unanswered such questions as whether the network under whose auspices a candidate's speech is broadcast but which is not itself licensed by the FCC is liable for the defamation even though the individual stations comprising the network are not; whether to the extent newspapers become "published" via the airwaves by the facsimile process, they too will be immune to claims of defamation by candidates and third persons.

We submit that the holding that licensees must broadcast libelous statements, particularly about persons who are not candidates, subverts the purpose of Section 315 and the policy of the Communications Act.

POINT IV

As construed below and applied to Petitioner Section 315 violates the Fifth Amendment.

Instead of construing Section 315 so as to "adopt that reasonable interpretation which removes it furthest from constitutional infirmity" (*Kovacs* v. *Cooper*, 336 U. S. 77, 84 (1949); *United States* v. *Witkowitz*, 353 U. S. 194 (1957)), the Court below held that it sanctioned the publication of libel against a person not a candidate for public office. We submit that if this holding of the North Dakota Supreme Court correctly construes Section 315, then as applied to petitioner in this case that section violates the due process clause of the Fifth Amendment. The Supreme Court of Nebraska said in *Sorenson* v. *Wood*, *supra* (p. 354):

> "We do not think congress intended by this language in the radio act to authorize or sanction the publication of libel, and thus to raise an issue with the Federal constitutional provisions prohibiting the taking of property without due process of law or without payment of just compensation. Constitution, Fifth Amendment."

It is not disputed that under North Dakota law, petitioner has a cause of action for libel against respondent. Indeed it has been held in the present case that a North Dakota statute purporting to immunize respondent from liability for broadcasting libel violates provisions of the

North Dakota Constitution, which guarantees protection of "reputation" "by due process of law" (*supra*, p. 36). Yet the Court below has denied the injured party the relief guaranteed to it under the North Dakota Constitution and given the respondent the immunity attempted to be given in a state statute that was held to violate the state Constitution. This strange result not only was unauthorized by the provisions of Section 315 but is contrary to the intent of Congress, which repeatedly has refused to enact the language (*supra*, p. 27ff) which the North Dakota Court has now read into the statute.

Other states whose constitutions protect the right of reputation "equally with the right to the enjoyment of life, liberty and property" (*Marion* v. *Davis*, 217 Ala. 16 (1927)) have similarly held that state laws attempting to deprive libel victims of adequate remedy are invalid. Thus, in Michigan it has been held that

> "There is no room for holding in a constitutional system that private reputation is any more subject to be removed by statute from full legal protection than life, liberty, or property. It is one of those rights, necessary to human society that underlie the whole scheme of civilization" *Park* v. *Detroit Free Press Co.* 72 Mich. 560, 566 (1888).

Likewise, in New Jersey it has been held that

> "* * * the people of this State, who ordained the Constitution, have not empowered the legislative body to authorize a newspaper publisher or any other citizen to unjustly injure his neighbor's reputation without making compensation for that injury". (*Neafie* v. *Hoboken Printing & Publishing Co.*, 75 N. J. L. 564 (1907).

To the same effect are *Byers* v. *Meridian Printing Co.*, 84 Ohio State Reports 408 (1911); *Harrison* v. *Krehbiel*,

68 Kan. 670 (1904). *McGee* v. *Baumgartner*, 121 Mich. 287 (1899). See also *Marion* v. *Davis, supra; Kennedy* v. *Item Co.*, 213 La. 347 (1948).

To permit a broadcaster to publish libel by a candidate against a third person who is not a candidate, free of liability to the victim, is arbitrary and capricious, and we submit, deprives the victim of property without due process of law.

The effect of Section 315 as applied by the Court below is to deprive the victim of redress against respondent, the primary disseminator of the libel. But for the act of dissemination on radio and television, the libel may inflict little damage. As the court said in *Coffey, supra*, but for what the broadcaster "has done, the victim of the defamation would not have been hurt" (p. 890). Since redress against the speaker may well prove inadequate (*supra* pp. 42, 43) the petitioner is deprived of any remedy. The effect of publication by radio and television is enormous. The magnitude of the impact is so great that the damage is far beyond that caused by publication through any other medium. This is not only because the audience is so vast but because the libel is dramatized by the immediacy of the voice and image of the speaker and this dramatic effect may be heightened by use of the manifold techniques of visual propaganda.

The statute, intended to give a candidate the equal opportunity to answer his opponent, has now been held to be a weapon to compel the station to broadcast, with immunity, libelous statements, not about the candidate but about a third person who is not a candidate. Such a holding with its devastating consequences, we maintain if construed to be authorized by Section 315 deprives the petitioner of its property without due process of law. It makes lawful an unlawful act. This is forbidden by the

doctrine of *Truax* v. *Corrigan*, 257 U. S. 312 (1921) and *Brinkerhoff-Faris Trust and Saving Co.* v. *Hill*, 281 U. S. 673 (1930). Section 315 as thus construed destroys petitioner's right to protection against injury to its fundamental property right by another who has "no special relation" to it. *Truax* v. *Corrigan, supra*, at 329.

There is no "permissible legislative objective" (*Silver* v. *Silver*, 280 U. S. 117, 122 (1929)) for putting a third person in the position of a helpless target. Whatever basis there might be to compel libel to be broadcast by a candidate against his opponent, there is none that can justify such action against persons who are not candidates. Nor is there rational basis for the assumption, which necessarily underlies Section 315 as construed, that safeguarding equal opportunity precludes a remedy for deliberate defamation of third persons. Such extreme measures are not necessary to insure equality on the air.

It is submitted that the action of the Court below in applying Section 315 to petitioner is capricious and subjects its reputation to injury without adequate redress. The statute, as thus applied, deprives the petitioner of property with due process of law in violation of the Fifth Amendment.

Conclusion

The judgment below should be reversed.

Respectfully submitted,

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APPENDIX A

Predecessor Statutes

The Radio Act of 1927, Sec. 18, 44 Stat. 1170:

Sec. 18. If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the licensing authority shall make rules and regulations to carry this provision into effect: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the authority of this paragraph. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.

The Federal Communications Act of 1934, 48 Stat. 1088:

Sec. 15. If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the Commission shall make rules and regulations to carry this provision into effect: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the authority of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.

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IN THE

Supreme Court of the United States

October Term, 1958

No. 248

FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA, NORTH DAKOTA DIVISION, A CORPORATION,

Petitioner,

v.

WDAY, INC., A CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus Curiae*

The American Civil Liberties Union, an organization whose sole purpose is the protection and promotion of the civil liberties of all persons in the United States, appears herein as *amicus curiae*, with the consent of the parties filed with the Clerk of this Court. *Amicus* believes a reversal of the judgment below would permit radio and television managers to deprive millions of Americans of the right to hear—free of prior restraint—the words of candidates for public office, by making such managers the final arbiters of the truthfulness, motives, intent and fairness of comment of a candidate who may make a statement which on its face is or might be defamatory, thus defeating the purpose of Section 315 of the Federal Communications Act to provide the widest possible forum for candidates in political campaigns.

We further believe that petitioner's novel theory that the fulfillment of a duty imposed by federal law may result in the creation of civil and criminal liability under state law, and that Congress is constitutionally inhibited from preventing such an anomaly, should be rejected by this Court because petitioner's construction of the law thus poses a threat to due process.

Summary of Argument

Section 315 of the Communications Act prohibits censorship by a licensee. A prior restraint, whatever its excuse, is of the essence of censorship. To argue that censorship does not include prior restraint of what one has no right to say is to confuse the question of what constitutes censorship with the question of the constitutionally permissible limits upon which censorship may be based. It ignores this Court's repeated use of the term "censorship" as including prior restraint of even that which constitutionally may be suppressed.

Congress could not have intended by implication to impose upon a licensee the duty of eliminating remarks libelous in civil or criminal law from speeches of candidates for public office. To determine what is libelous, a licensee would have to determine the libelous nature of the speech if untrue, its truth or falsity, its status as fair comment, whether it is privileged as a means for redressing grievances, and whether it is made with good motives and justifiable ends—all during the heat of a relatively short political campaign and under the differing and complex laws of defamation, civil and criminal, in several states. Such arduous tasks would tend to make the scrupulously fair broadcaster minimize the time allotted to political broadcasts or eliminate all possibly libelous-suspect controversial material, or both. Such tasks, if imposed, would also afford an opportunity to the less scrupulous broadcaster to encroach upon freedom of utterance under the guise of preventing libel. Congress *sub silentio* could not

have intended to permit licensees to make deletions which might significantly affect the outcome of an election by depriving audiences of millions of the right to hear the uncensored remarks of candidates for public office. The interest of the electorate in the fullest freedom of speech by candidates requires that the law be construed to deprive a licensee of the power to censor for libel lest much that is non-libelous fall to the censor's bludgeon in his necessarily over-cautious, or possibly biased, approach in determining the complicated issue of whether libel exists.

Since the word "censorship" in § 376 of the Act (generally denying the power of censorship to the Federal Communications Commission) concededly means precisely the same as in § 315 (specifically denying such power to the licensee in the case of candidates' broadcasts), the Commission, under petitioner's construction of the law, would have the power to subject speeches of candidates to prior restraint, a power which it clearly does not and constitutionally cannot have. While the Commission may review a station's over-all conduct in determining whether to renew a license and may consider whether the station has wrongly tolerated libels, still such *post facto* consideration does not constitute prior restraint and hence does not constitute censorship. Moreover, it would be arbitrary and unreasonable for a Commission to even *post facto* consider derogatory to a licensee the utterance on its facilities of libelous remarks under the compulsion of Section 315.

While it is true that in some situations, a party defamed through the use of Section 315 may not find his remedies adequate in a civil suit for damages against the speaker, his interest must be relegated to the domain of *damnum absque injuria*, for the public interest in fullest freedom of speech for political candidates as a vehicle towards achieving the fullest enlightenment of the electorate considerably overbalances any such possible injustice. Such injustices are believed rare (and this is not shown to be such a case); they hardly rise to the clear and present danger which could conceivably justify the imposition of censorship.

While a state cannot constitutionally deprive a pers
of a remedy for a wrongful act, federal pre-emption of
area, as here, of necessity often results in the deprivati
of remedies to states and individuals alike, otherwise ava
able under state law. To argue, as petitioner does, th
such deprivation violates due process, is to argue for t
unconstitutionality of a plethora of federal regulatory leg
lation whose constitutionality has been clearly establishe

If Section 414 of the Act, preserving remedies und
state law, be not restricted to the remedies of those reg
lated by the Act rather than including all whom broa
casters affect, we contend that as applied here it wou
deprive respondent of property without due process. Co
gress cannot constitutionally require a station to carry po
sibly libelous remarks of a political candidate and at t
same time subject it to civil and criminal liability therefo
This would be not mere liability without fault, but liabili
as a result of performing mandatory statutory obligation
Such liability is unheard of in our jurisprudence and wou
be so thoroughly arbitrary and unreasonable as to be unco
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I.

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prior restraint of allegedly defamatory material.**

A. Prior restraint is of the essence of censorship and therefore forbidden by Section 315, whatever its ba

> "Censorship may be defined as the forbidding
> publication, i.e., prohibition of publication in adva
> of publication." *Allen B. Dumont Laboratories
> Carroll*, 184 F. 2d 153, 156 (C. A. 3 1950), cert. de
> 340 U. S. 929.

This is the classic concept; see 4 Bl. Comm., *151-53. Petitioner, by invoking a definition of censorship tailored to the case ("the deletion of something which one has a legal right to say", Pet. Brief, p. 14), has substantially confused the question of what are constitutionally permissible grounds for the exercise of censorship, with the question of what constitutes censorship itself.

This Court has frequently used the term "censorship" to include pre-publication deletion even for materials which clearly do not have the freedom of the press; *e.g.*, this Court carefully left open the question of "whether a state may *censor* motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films." (*Burstyn* v. *Wilson*, 343 U. S. 495, 506; emphasis supplied. See also *Kovacs* v. *Cooper*, 336 U. S. 77, 82; and *Near* v. *Minnesota*, 283 U. S. 697, 713, 716; where this Court pointed out that suppression before publication "is of the essence of censorship", and that "immunity from previous restraints" is but an alternative to the term "censorship".)

In *Near*, *supra*, the injunction reversed by this Court did not prevent all publication; it merely enjoined the publication of a libelous newspaper. *Id.* at 712-13. Yet this was held to be of the essence of censorship. Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemporary Problems (1955) 648, *et seq.*, esp. 654.

B. The public interest in the fullest freedom of speech for candidates requires that licensees not be empowered to use prior restraint on any basis.

Petitioner apparently agrees that a station has no right to delete speech which one has a legal right to utter (Pet. Brief, p. 21). At least under the law of civil libel, one has a legal right to utter words which are true though defamatory on their face. Petitioner's construction of Section 315 imposes the minimal duty upon a licensee to determine the truthfulness of defamatory accusations (and

still further duties under the law of criminal libel, *infra*, pp. 6-7). We submit that such duties would not have been imposed by Congress *sub silentio* for several reasons:

1. In the heat of a political campaign, accusations are hurled by the score each day. To require a licensee to be the judge of the truthfulness of such accusations as are defamatory is to require the exercise of a judgment which, if it not be reserved to the electorate under the Ninth and Tenth Amendments, as we here suggest, is impossible for the licensee to make quickly. In the instant case, it would have had to determine whether petitioner was in fact a Communist organization. While happily it is known to *amicus* that the *Farmers Union* surely is not such an organization, it is unlikely that, in the five or six days between the speech and the election, the station could have garnered enough information and assessed it intelligently to determine the falsity of the allegation.[1]

2. Petitioner claims that a licensee must, under its construction of the law, delete that which is criminally libelous. Such a construction of the law would require the licensee to ascertain not merely the truthfulness of the charge, but also to assess whether the projected utterance is fair comment, is privileged as a means for redressing grievances, and is to be made with good motives and justifiable ends. *Beauharnais* v. *Illinois*, 343 U. S. 250, 263-5. We submit that Congress did not intend to give a licensee such duty with the resultant power of sub-

[1] Even if this could have been determined quickly in the instant case, the charges and rejoinders concerning the Progressive Party in the 1948 Presidential campaign were certainly beyond any station operator's ability to evaluate in time to comply with Section 315, if "except for non-libelous material" is read into the statutory prohibition against censorship.

stantially unbridled censorship over legal as well as illegal speech. Thus, assuming that the speaker in the instant case was speaking truthfully, the licensee—under petitioner's construction of Section 315—would still have had to bar his accusatory remarks unless it was persuaded that a jury would later be persuaded of the speaker's good motives and justifiable ends, etc.

3. It may be in many cases tremendously difficult to determine whether a particular charge is libelous even on its face, quite apart from the questions raised above.[2] Not only must this be determined under the law of one state, but to the licensee's task would be added the question of what to do with the speech which will be heard in more than one state (as here), if it might be libelous in one or more of these states but not in another.[3]

If the licensee be the final (or even the initial) arbiter of the truthfulness, fairness of comment, goodness of motives and justifiability of ends, the most impartial of licensees, in order to be safe, would have to ban from the airwaves any statement of a political candidate which could possibly be defamatory merely upon its face under the law of libel which is the strictest of the divers states in

---

[2] Ernst & Lindey, *Hold Your Tongue* (1952), at p. 5: "But no nch of [the law] is as bewildering in its contradictions, as involved ts reasoning, as mercurial in its changes, as rich in anomalies and cdotes, as the law of libel and slander."

[3] This only begins to state possible problems. Some suggested ers are: What is a licensee to do when some of the states in which television broadcast will be seen may rule demafatory statements TV to be mere slander, and not subject to the rules of criminal l? What of a simulcast, if one was afforded to a prior speaker, re for the radio transmission the licensee could not inquire into l motives, etc. (there being no question of criminal libel), but re for the simultaneous TV transmission, the licensee would have elve into such esoteric matters?

which the material would be broadcast. The most fastidiously impartial licensee would find himself, almost of necessity nurtured by self-preservation, either banning controversial material attacking individuals or groups in a manner that might possibly be considered defamatory, or curtailing available airtime for candidates even below the minimal periods now provided, or both.[4] The licensee who is not so fastidiously impartial would be provided with any number of tenable reasons for banning material with which he disagrees. The net effect of a reversal of the decision below would thus be to curtail freedom of political debate on the airwaves. Surely Congress did not intend to do so by giving censorship powers to licensees through the use of language which in its very terms prohibits censorship. If Congress really intended to authorize licensees to impose prior restraints on speeches of political candidates, a serious constitutional question would arise; the acts of the licensees would be the acts of the state (*Public Utilities Commission* v. *Pollak*, 343 U. S. 451, 462), and the question would arise of whether a prior restraint of libel is not a violation of free speech under the doctrine of *Near*, *supra*. Such a serious constitutional question requires that petitioner's construction of Section 315 be rejected. *Rumely* v. *United States*, 345 U. S. 41 (1953). Congress cannot be held to have enabled suppression of freedom of utterance under the guise of preventing libel[5]; Congress should not be held to have attempted the enablement of suppression by using language directed against censorship.

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[4] Friedenthal & Medalie, *Political Broadcasting*, 72 Harv. L. Rev. 445, 486.

[5] "'While this Court sits' it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel." *Beauharnais* v. *People*, *id.* at 263-4.

4. As petitioner and the United States have both properly contended (Pet. Brief, p. 41), under the construction of the statute below "the licensee would be powerless to prevent the very widespread dissemination of patently defamatory statements, which might significantly affect the outcome of the particular election." This statement, to us, is key. For the excision of supposedly defamatory statements from the remarks of any candidate, be he the first or last speaker,[6] might, by the very same token, also significantly affect the outcome of a particular election. The question is whether Congress has imposed upon the licensee the duty to take steps which themselves may significantly affect the outcome of a particular election. We cannot believe that the Congress intended to give such power.

The petitioner properly points out, in stressing the immeasurability of damages inflicted upon a third person through defamatory statements, that a speaker on the airwaves is given facilities to reach theoretically the greatest audience ever addressed. By the same token, it cannot be assumed that Con-

[6] Petitioner argues that the no-censorship rule should apply only to the right of reply, and not to the original remarks uttered by the first-speaking political candidate. We submit that it would be most unfortunate were this construction of the law to be adopted by this Court, for the reason that surely Congress did not intend that licensees should have the right to censor the remarks of the first political candidate who speaks merely because he is the first, while lacking that right in connection with later candidates. For one thing, the theory of Section 315 is not predicated upon an assumption that candidates speaking after the first candidate will be replying to that first candidate; their remarks may be on issues entirely different. Secondly, if there is no right to censor the remarks of the first candidate, the later candidates would clearly be treated unequally with the first. Construed as petitioner would have this Court construe the statute (Pet. Brief, p. 14), it would thus raise a serious question of denial of equal protection of the laws, and hence of federal due process. See also *Friedenthal & Medalie, op. cit., supra,* n. 4 at 478-9.

gress intended to give a licensee powers of censorship which would deprive this theoretically vast public of the right to hear the statements in full of candidates for public office. This would truly be the grossest censorship power ever given any person in our history, a power which should certainly not be implied in the absence of plain language granting it, and in the presence of language which by its very terms expressly prohibits it.

The public interest in the fullest and freest discussion of political issues by candidates requires that they speak freely, without any form of prior restraint for any reason whatsoever,[7] in the absence of a clear and present danger. This Court said in *Cantwell* v. *Connecticut*, 310 U. S. 296, 310:

"In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to villification of men who have been, or are prominent in church or state, and even to false statement. But the people of this nation

[7] Petitioner presents a lengthy list of various types of purportedly illegal speech which it argues a licensee is under a duty to prevent should they occur in the speech of a political candidate (Brief, pp. 19-21), arguing that the excision of any remarks which may constitute federal offenses also could not be considered censorship. Quite apart from the remoteness of possibility of a candidate for public office committing any of these various speech offenses, the power of deciding whether or not an offense had been committed during heated political controversy in the pre-election period, would permit censorship on many matters of admitted importance. Thus, for example, speech advocating the overthrow of a government by force and violence, made criminal, is not the easiest thing in the world to detect as such; witness this Court's reversals of lower federal court decisions, convicting various defendants for violation of the Smith Act. Moreover, this Court has indicated that it will in many situations carefully review the entire record to determine if the offense was made out (*Dennis* v. *United States*, 341 U. S. 494). Obviously, Congress did not intend to entrust to the licensee the determination of which speech is constitutionally protected and which is not.

have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."[8]

C. Section 326 of the Act fortifies this conclusion.

Petitioner argues that Section 326 of the Act, providing that "nothing in this chapter shall be understood or construed to give the Commission the power of censorship", when taken together with the Commission's clear power to consider libelous remarks in determining whether or not to renew a license, further warrants the conclusion that a station may impose a prior restraint on the grounds of alleged libel. On the contrary, Section 326 of the Act reenforces our conclusion, for the Commission, in determining whether or not to renew a license *after* a speech has been made, certainly is not exercising censorship, since it is not prior but is a subsequent sanction.[9] If petitioner is

[8] Petitioner seeks suppression of precisely what *Cantwell* held constitutionally protected. Says petitioner: "If Section 315 is held to permit radio and television licensees to broadcast libelous statements without liability to those defamed, the door will be open to shocking possibilities in future political campaigns. Individuals and organizations will be subject to abuse and vilification in the heat of campaigns * * *" (Petition for Certiorari, p. 8).

[9] "Appellant contends that the attitude of the Commission amounts to a censorship of the station contrary to the provisions of [the statute]. This contention is without merit. There has been no attempt on the part of the Commission to subject any part of appellant's broadcasting matter to scrutiny prior to its release. In considering the question of whether the public interest, convenience or necessity, will be served by a renewal of appellant's license the Commission has merely exercised its undoubted right to take note of appellant's past conduct, which is not censorship." *KFKB Broadcasting Ass'n* v. *Federal Radio Commission*, 47 F. 2d 670, 672 (C. A. D. C. 1931).

Surely, however, the Commission could not even *post facto* weigh against the licensee the fact that libel went on its airwaves through the compulsion of Section 315. Any such action, though not censorship, would clearly be arbitrary and unreasonable (cf. *infra*, pp. 14-15), and hence violative of due process.

to prevail, then it must logically contend that since excision of alleged libel does not constitute censorship, the Federal Communications Commission is therefore entirely free to go over speeches of candidates for public office (and of all others) *in advance of their delivery* in order to delete remarks which one has no legal right to utter. It is manifest that this is precisely what Section 326 was designed to prevent, just as Section 315 was designed to prevent any prior censorship by the licensee itself of political speeches. If, as petitioner contends (Brief, p. 26), the word censorship means exactly the same in Sections 315 and 326 of the Act, as indeed it must, then it is clear that the licensee, just like the Commission, has no power to suppress prior to publication.

D. The third party libelled is not left without a remedy; if it be unavailing, then it is *damnum absque injuria.*

Petitioner argues that the remedy against a speaker is not necessarily adequate to prevent defamation, or to remedy the evil, since the speaker may be financially irresponsible, outside the jurisdiction where the libeled person is located and presumably has suffered the greatest injury, or unamenable to process. Though such difficulties in enforcement of remedies may on occasion exist (though not shown to exist here), this is common to almost every type of lawsuit. But here the innocent third party may be better off than the average litigant. For in Section 315 situations, the innocent third party need not be the victim of *damnum absque injuria*. His remedy may lie in a criminal libel prosecution against the speaker. Or he could demand equal time to reply, which, if not granted, would militate against renewal of the station's license. But even were the innocent third party to find all remedies inadequate, in some hypothetical cases (none of which remedies are shown to have been pursued here), still the lack of the best of all possible remedies in some hypothetical cases must be balanced against the interests of millions of people in hearing the broadcast without prior restraint. Since

this Court has ruled that even speech may be suppressed when the public interest overbalances the social value of the utterances (i.e., *Roth* v. *U. S.*, 354 U. S. 476), we submit that relegation to *damnum absque injuria* in some hypothetical situations is amply justified by the tremendous public interest in avoiding any prior restraint of speech of candidates for public office. Cf. *Terminiello* v. *City of Chicago*, 337 U. S. 1, 5 (1949).

E. Section 315 as construed below and applied to petitioner, does not violate the Fifth Amendment.

Petitioner contends that when a federal statute pre-empts the field, any deprivation of a state remedy, thus making lawful an unlawful act, violates due process. Petitioner cites *Truax* v. *Corrigan*, 257 U. S. 312, and *Brinkerhof-Faris Trust and Saving Co.* v. *Hill*, 281 U. S. 673, in support of this proposition. While these cases do hold that a *state* statute making lawful an unlawful act in depriving a person of a remedy for a right is unconstitutional, they nowhere even intimate that *federal regulation* of an area which thus deprives a person of a state remedy or makes lawful an unlawful act is unconstitutional. Even if the two cases be good law today, still it would seem to be clear that federal pre-emption of an area cannot be unconstitutional because it deprives a person of a state remedy. As in *Teamsters Union, Local 24* v. *Oliver*, 27 L. Wk. 4077, January 19, 1959, federal pre-emption frequently deprives even a state of its remedy for conduct unlawful under its laws. One need look no further than the federal bankruptcy laws, the areas of trade and labor regulation, or minimum wages and hours to see the many areas in which federal pre-emption does result in making lawful an unlawful act and in which federal law does deprive a person or a state of a state remedy. Petitioner's argument proves entirely too much. It would, if accepted, undermine vast areas of federal legislation.

II.

If the Federal Communications Act does not give immunity to a licensee for broadcasting a candidate's defamatory statement, while requiring it to do so, it would be violative of the due process of law protection of the Fifth Amendment of the Constitution.

Petitioner argues that even if Section 315 means that there can be no prior restraint by a licensee of a candidate's speech, the Congress nevertheless refused to confer immunity from defamation. Persuasive indeed is petitioner's citation of Section 414 of the Communications Act, providing that the Act shall not abridge or alter remedies now existing in common law or by statute. But Section 414 is silent as to its definition of remedies: Whose remedies, and remedies for what? We submit that Section 414 must refer solely to remedies for persons engaged in broadcasting operations themselves, not to persons whose activities are unregulated by the Act and who became involved only tangentially.

It is our contention that since Section 315 was intended to require that stations could not excise allegedly libelous remarks from speeches of political candidates, Section 414 would be so arbitrary, unfair, unreasonable and oppressive as to deprive the licensee of property without federal due process if it left the station open to civil and criminal prosecution under state law. While petitioner contends that liability without fault, particularly in the field of defamation, has long been a part of our law, we know of no situation in which liability without fault has ever been imposed where the facts out of which liability arises stem from compliance with mandatory requirements of law. It would seem obvious that if newspapers were required by statute to publish libels, they could not be held guilty of civil and criminal libel for fulfilling their statutory obligations. Petitioner argues that insurance agreements

may be the solution to the broadcasters' dilemma, but this overlooks the fact that insurance cannot protect against the criminal libel law.[10]

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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[10] Insurance may not even be available for civil cases. See *Friedenthal & Medalie, op cit., supra,* n. 4, at 484. Of course, an indemnity agreement from a judgment proof speaker is itself worthless.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 248

FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA, North Dakota Division, a corporation, *Petitioner*,

v.

WDAY, INC., a corporation, *Respondent*.

On Writ of Certiorari to the Supreme Court of the State of North Dakota

BRIEF FOR THE RESPONDENT, WDAY, INC.

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BRIEF FOR THE RESPONDENT, WDAY, INC.

OPINION BELOW

The opinion of the Supreme Court of North Dakota handed down April 3, 1958, (R. 30) is reported at 89 NW 2d 102.

JURISDICTION

The petitioner invoked the jurisdiction of this Court under 28 U.S.C. 1257 (3) for the stated reason that the cause involves an assertion of immunity under a statute of the United States (Section 315 of the Communications Act of 1934, c. 652, 48 Stat. 1088, as

amended, c. 229, 66 Stat. 717, 47 U.S.C. 315) and in that the cause involves the validity of the statute, as construed below, under the Fifth Amendment to the Constitution of the United States.

INTRODUCTION

The respondent has had the benefit of examining the extensive briefs of the National Association of Broadcasters as *amicus curiae* and the petitioner. The respondent is a member of the National Association of Broadcasters and as such, adopts the *amicus* brief as its own. It would serve no purpose to restate the authorities and the arguments in the *amicus* brief.

STATEMENT OF THE CASE

We accede to the Petitioner's statement of the case but as framework for the argument we are about to advance, and for emphasis, we wish to restate and enlarge certain facts.

The respondent has been a licensee of the Federal Communications Commission and its predecessor bodies since 1923. It operates one of the oldest radio stations in the United States. It has had a television license since 1953. In its relationship with the Federal Communications Commission it has not found itself criticized by the Commission during the pendancy of its licenses. Its radio and television facilities have been fully available to all political candidates and have been used more than those of any other licensee in the area. It has not heretofore been sued for libel nor charged with having permitted any libelous statement to be made over its facilities.

At the time of the telecast complained of, the respondent was aware of its potentially libelous

characteristics, having been so advised by its attorney. The respondent required Townley to make a written demand for time under the provisions of Section 315 of the Communications Act of 1934, 47 U.S.C.A. 315. The demand having been made, it made a film of the speech, as it had filmed the speeches of Townley's opposing candidates, Senator Young and Quentin Burdick. It telecast the film in the absence of Townley. There was present every opportunity for editorial excision, either completely or partially, that there is in the usual publication of a paid advertisement in a newspaper.

The respondent was fully aware of the directives of the Federal Communications Commission, *In The Matter of Port Huron Broadcasting Company*, 4 Pike & Fischer, RR 1, and *In The Matter of WDSU*, 7 Pike & Fischer, RR 769. Being informed of the potentially libelous character of the Townley speech and the mandate of Section 315 as interpreted by the Federal Communications Commission, the respondent was faced with several choices: imposing upon Townley the condition that his speech be amended before it would be telecast, physically cutting from the film those parts of the speech which the respondent considered to be potentially libelous and telecasting the remainder, or complying with the direction of the Federal Communications Commission about which the Commission had stated "there is no open question", *In the Matter of WDSU, supra.* It elected to follow the mandate of the licensing agency in the belief that under the circumstances either the publication was privileged, under the view of the law which has been stated in the *amicus* brief, or that it was acting simply

as a "disseminator" and not a publisher, in another view of the law which we will briefly discuss.

The North Dakota statutes define civil libel as follows:

> "Civil Libel Defined. Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." NDRC 1943, Sec. 14-0203.

The North Dakota statute concerning privileged communication provides:

> "Privileged Communications. A privileged communication is one made:
>
> 1. In the proper discharge of an official duty;
>
> 2. In any legislative or judicial proceeding, or in any other proceeding authorized by law;
>
> 3. In a communication, without malice, to a person interested therein by one who also is interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information; and
>
> 4. By a fair and true report, without malice, of a judicial, legislative, or other public official proceeding, or of anything said in the course thereof.
>
> In the case provided for in subsections 3 and 4 of this section, malice is not inferred from the communication or publication." NDRC 1943, Sec. 14-0205.

In 1953 the North Dakota Legislature adopted a statute intending to limit the liability of a broadcaster for defamation by radio and television:

> "Defamation By Visual or Radio Broadcast; Limitation of Liability. The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, by one other than such owner, licensee or operator or agent or employee thereof." NDRC 1943, 1957 Supplement, Sec. 14-0209.

In 1929 the North Dakota Legislature adopted a statute declaring defamation by radio to be a criminal offense:

> "Slander by Means of the Radio; Punishment. Every person who falsely uses, utters, or publishes words over, through, or by means of the radio, which in their common acceptance tend to blacken the memory of one who is dead or to impeach the honesty, integrity, virtue or reputation or to publish the natural defects of one who is alive and thereby to expose him or her to public hatred, contempt, ridicule, or financial injury, is guilty of slander and shall be punished by a fine of not more than one hundred dollars." NDRC 1943 Sec. 12-2815.

The North Dakota Constitution, so far as it directly concerns libel, provides:

> "Every man may freely write, speak and publish his opinions on all subjects, being responsible for the abuse of that privilege. In all civil and criminal trials for libel the truth may be given in

evidence, and shall be a sufficient defense when the matter is published with good motives and for justifiable ends; and the jury shall have the same power of giving a general verdict as in other cases; and in all indictments or informations for libels the jury shall have the right to determine the law and the facts under the direction of the court as in other cases." Constitution of North Dakota, Article I, Section 9.

ARGUMENT

Point I.

The Respondent in the Circumstances in This Case, Acting Under the Mandate of Section 315, is a Disseminator and Not a Publisher of the Defamatory Statements Complained of.

The brief of the petitioner is in part predicated on the assumption that *Sorensen* v. *Wood* (Neb.), 243 NW 82, 82 ALR 1098, and *Summit Hotel Company* v. *National Broadcasting Company* (Pa.), 8 A. 2d 302, 124 ALR 968, were right in approaching the evaluation of the broadcaster's position through attempting to correlate it with the position of the public press in similar situations.

The court in *Sorensen* writing in 1932 and viewing radio as essentially a commercial advertising medium took a somewhat parochial view in arriving at the conclusion that publication by a newspaper and by a radio station were identical:

> "The defendant company, like most radio broadcasters, is to a large extent engaged in the business of commercial advertising for pay. It may be assumed this is sufficient not only to carry its necessary large overhead, but to make at least a fair return on its investment. For it appears that the opportunities are so attractive to investors

> that the available airways would be greatly overcrowded by broadcasting stations were it not for restriction of the number of licensees under federal authority. Such commercial advertising is strongly competitive with newspaper advertising because it performs a similar office between those having wares to advertise and those who are potential users of those wares. Radio advertising is one of the most powerful agencies in promoting the principles of religion and of politics. It competes with newspapers, magazines and publications of every nature. The fundamental principles of the law involved in publication by a newspaper and by a radio station seem to be alike. There is no legal reason why one should be favored over another nor why a broadcasting station should be granted special favors as against one who may be a victim of a libelous publication." 243 N.W. at page 86.

It had previously subscribed to the doctrine of absolute liability of a newspaper publisher announced in *Peck* v. *Tribune Company*, 214 U.S. 185, 53 L. ed. 960.

Seven years later, in 1939, the Pennsylvania Supreme Court in *Summit* concluded that the rule of absolute liability announced in *Peck* v. *Tribune* was not applicable in Pennsylvania, at least in so far as it could be extended to apply to a broadcaster. It then further determined that the rule of absolute liability, not being applicable to newspapers, should not be extended to broadcasters "where it appears that it exercised due care".

Sorensen and *Summit* still do not answer the precise question presented in the instant case for *Sorensen* involved a broadcast by a person not a candidate (Woods was speaking in behalf of the candidate) and

Summit involved an ad-libbed remark which was physically beyond the control of the broadcaster and, too, was not related to the problems presented by an interpretation of Section 315. While the results in *Sorensen* can be squared with the opinion of the court below and the resulting rule in *Summit* can be applied to absolve this respondent of liability, there being no doubt that the respondent acted positively, deliberately and without negligence, neither case presents as comprehensive a shelter for the respondent as does *Kelly* v. *Hoffman,* (N.J.) 61 A. 2d 143, 5 ALR 2d 951. In the *Kelly* case the facts are not entirely clear in the opinion. It does appear that copies of the complained-of script were available to the defendant broadcasting company and that the statements were libelous *per se.* The New Jersey court sums up the position which the respondent, WDAY, asserts in this point in its argument:

> "There are two schools of thought as to the act of publishing the defamatory statement by the broadcasting medium—one of so-called absolute liability as explained in Sorensen v. Wood, 1932, 123 Neb. 348, 243 N.W. 82, 83, 82 ALR 1098, and the other of liability based upon negligence as elucidated in Summit Hotel Co. v. National Broadcasting Co., 1939, 336 Pa. 182, 8 A. 2d 302, 124 ALR 968.
>
> "Volume 3 of Torts Restatement of the Law, page 213, contains the following:
>
> 'f. Radio Broadcasting. The proprietors of a radio broadcasting station are at least liable under circumstances which would make a disseminator of defamatory matter liable under the rule stated in this section, that is, if they fail to exercise reasonable care to prevent the publication of defamatory matter. The Caveat to § 577 raises

the question, on which the Institute takes no position, as to whether such persons are not further liable as original publishers under the rule stated in that Section.'

"And at page 196, the following is set forth:

'Caveat: The Institute expresses no opinion as to whether the proprietors of a radio broadcasting station are relieved from liability for a defamatory broadcast by a person not in their employ if they could not have prevented the publication by the exercise of reasonable care, or whether, as an original publisher, they are liable irrespective of the precaution taken to prevent the defamatory publication.'

"The doctrine of so-called absolute responsibility can only be invoked by the application of the law of libel to broadcast defamation. Ordinary libel differs from slander in that the former is more deliberate, has a much wider circulation and is permanent. The argument for classifying a radio broadcast a libel is that it has the quality of deliberation and has far-reaching circulation and in the latter respect is more damaging than libel, if untrue, although it does not have the permanency of printed matter. Yet printed defamatory words are libelous even though they reach but a few; a defamation takes this category if the printed matter is read by only one, although that would be a consideration entering in the quantum of the damages.

"It is contended by the appellant that some of the cases holding an absolute liability turn upon an alleged analogy of liability of a newspaper for publication. But there is obvious distinction between a newspaper libel and defamation by radio, especially where the defamation made is an interjected extemporaneous remark. The rules of law applicable to libel are based in the main on

the permanence of the defamation. There are considerations which may warrant the extension of absolute liability to radio defamation, such as the size of the radio audience; the ineffectiveness of retraction. These are questions of social policy to be resolved in the legislative forum. The rule or terminology of absolute liability may hamper the radio in the performance of a public service; on the other hand the power of the radio may be abused. The balancing of the benefits and advantage and the evils arising from the abuse of the power are questions for the Legislature.

"A further discussion to determine whether the action of the station constitutes a libel or slander is immaterial in this case as the defamatory matter is actionable without proof of special damage (supra).

"The crux is the responsibility as a disseminator. Bigelow on Torts 8th Ed. page 287 states the hornbook rule on publication thus: 'Defamation is published when the charge, suggestion, insinuation, or representation is made, by the defendant, in presence of a third person, either by intention or by negligence, or with reasonable ground to suppose that it will become known to others.'

"In an article by Professor Francis H. Bohlen of the University of Pennsylvania (1937), reported in 50 Harvard Law Review (1937) at page 731, it is stated:

'It would seem that justice would be done and the good reputation of mankind given sufficient protection by treating the broadcasts as a disseminator rather than publisher of the defamatory interpolation.

'As disseminator like booksellers and the proprietors of newsstands, the broadcasting company would be liable if, but only if, it had failed

to exercise reasonable care to see to it that no scandalmonger should take advantage of its facilities to speak over its microphone matter defamatory of other persons.'

"We elect to decide this case upon the broad duty of this defendant as a disseminator.

"The defendant-respondent as a radio broadcasting company which leased its facilities is not liable for a defamatory statement during a radio broadcast by the person hired by the lessees and not in the employ of the radio broadcasting company, the words being carried to the radio listeners by its facilities, if it could not have prevented publication by the exercise of reasonable care."

This statement of the law finds substantial support in the writings of the English constitutional historian, Dicey, who points out that the very absence of what could be called "press law" resulted in England in the extension of the common law concepts of defamation to publication by the press.

"The law of the press as it exists here is merely part of the law of libel, and it is well worth while to trace out with some care the restrictions imposed by the law of libel on the 'freedom of the press' by which expression I mean a person's right to make any statement he likes in books or newspapers." * * * (at page 236)

"The liberty of the press, then, is in England simply one result of the universal predominance of the law of the land. The terms, 'liberty of the press', 'press offenses' and 'censorship of the press' and the like are all but unknown to English lawyers, simply because any offence which can be committed through the press is some form of libel and is governed in substance by the ordinary law

of defamation." Dicey, *Introduction to the Study of the Law of the Constitution*, at page 247. (MacMillan & Company, Ltd., 1923).

In a very recent note, *Censorship of Defamatory Political Broadcast, The Port Huron Doctrine*, by Harvey Lyle Zuckman, 34 New York University Law Review 127, the author points out at the outset, "The first amendment prohibits prior licensing of the press".

In *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U.S. 134, 84 L. ed. 656, this court recognizes the creation of a "unified and comprehensive regulatory system" of the broadcasting industry and the intention of Congress "to maintain through appropriate administrative control, a grip on the dynamic aspects of radio transmission". 309 U.S. at 138, 84 L. ed. at 659.

We urge that the Congressional enactments related to the technology of electronic communication constitute a new statutory body of law against which the liabilities and rights of licensees of the Federal Communications Commission must be measured.

This respondent has exercised "reasonable care" pursuant to the mandate of Section 315 and to the concept of free discussion insured by the statute. It may be fairly concluded that it is the intent of Congress by this "special radio law", there being no press law, that the respondent licensee should not exercise his discretion in any manner other, of course, than the prevention of criminal offenses defined by Federal statute. Quite obviously, an evaluation of the obligations of the respondent within the framework of the facts of this case, indicates that the respondent

has, by statute, been deprived of the right of exercising the editorial discretion that is inherent in the measurement of the liability of an alleged tort feasor in the usual press case. The respondent can only be described as a "disseminator" of the words complained of within the doctrine in the *Kelly* case.

That various segments of the broadcasting industry have strong and divergent views with reference to the legislative wisdom which has created this situation is best evidenced by an editorial in a trade publication regarded by many as the spokesman of the industry:

"SECTION 315's LAST LAP"

"Everyone who believes that broadcasting does or should amount to anything as a journalistic force will cheer the U. S. Supreme Court's decision to review the political broadcasting law.

"This law does everything that a law governing journalism should not do. It has reduced radio and television, during election campaigns, to the status of communications carriers with no authority over the traffic they bear.

"As long as it remains in effect, the law makes the broadcaster the equal of the Western Union messenger or the switchboard operator. It prevents him from becoming the equal of the publisher of the smallest, least influential newspaper in the land.

"The broadcasting law, which is Section 315 of the Communications Act, requires the broadcaster to give equal opportunities to all political candidates for a given office, providing he has given opportunity to any, and prohibits him from censoring — which is to say editing — any candidate's speech.

"The case now before the U. S. Supreme Court is the classic illustration of Section 315 in action.

"WDAY-TV Fargo, N.D., in compliance with the law, sold time to an independent candidate for a U. S. Senate seat after it had sold like time to the Republican and Democratic candidates.

"The independent was a political nonentity. By stretching journalistic fairness to its limits, North Dakota newspapers were giving him an occasional inch. Events proved the superiority of editorial judgment over government fiat in decisions affecting the dissemination of information. The independent polled 937 votes to his Republican opponent's 155,305 and the Democrat's 87,919.

"On his television appearance the independent made a speech which contained questionable references. Again in compliance with the law, WDAY-TV officials did not censor the speech despite their awareness of its dangers. Their reward for observing the law was to be sued, jointly with the candidate, for $150,000 libel damages.

"The North Dakota Supreme Court, whose decision the U. S. Supreme Court has now agreed to review, held that because Section 315 prohibited the station from censoring the speech, it implied immunity for the station from libel action.

"There are some broadcasters (and some lawyers) who approved that decision.

"But, at best, it is a half-measure. If broadcasters are to achieve journalistic maturity, the North Dakota court's interpretation should not be allowed to stand. The larger question of constitutionality of Section 315 must be decided.

"If broadcasting is immunized from libel in the political speeches it broadcasts, it will have ceded

yet another responsibility to government. To cede responsibilities willingly to others is the surest indication of unwillingness to grow up.

"What all broadcasters should be seeking vigorously is the opportunity to present political candidates and political news with the freedom enjoyed by other media. They should be clamoring to be given that authority and the responsibilities that go with it. They should be volunteering their full support in the preparation of the Section 315 case before the Supreme Court."—Broadcasting, Oct. 20, 1958.

Point II.

The Telecast of the Townley Speech Was Not an Exercise of a "Privilege of Libeling" (Petitioner's Brief, Pages 13-14) the Respondent Acting Only as a Disseminator Under the Mandate of Section 315.

The fact that a person may be defamed in the course of a broadcast is no more related to Section 315, and Section 315 is not subject to challenge because of it, than is the entire Communications Act of 1934 under which the respondent is licensed.

The arbitrary deletion of materials proposed to be broadcast is censorship no matter how one argues and notwithstanding the views expressed by the Court in the *Sorensen* case, *supra*. *Sorensen* does not say that such deletion is not censorship but, rather, that it is not the kind of censorship proscribed by Section 315:

"We are of the opinion that the prohibition of censorship of material broadcast over the radio station of a licensee merely prevents the licensee *from censoring the words as to their political and partisan trend* but does not give the licensee any privilege to join and assist in the publication of

a libel nor grant any immunity from the consequences of such action." (Italics supplied). 243 N.W. at page 85.

Whether Townley had a legal right to make this speech without defaming the petitioner or without violating the North Dakota statute against criminal liability depended upon the truth or falsity of his statements as they might ultimately be proven in a court of competent jurisdiction. In North Dakota, even in a criminal libel, truth is a defense. (Constitution of North Dakota, Article I, Sec. 9; Section 12-2804, NDRC 1943.)

The mere fact that the respondent believed the proposed statement to be false (R. 9) does not give the respondent the right to substitute its opinion for the final determination of a court. If it should finally be determined that the Townley statements were true, then they were statements that Townley had a "legal right to say". (Petitioner's brief, page 14.) The respondent believes that the very act of deleting material in a proposed broadcast because of doubt as to its truth or falsity or for any other reason constitutes an act of "censorship" within the meaning of Section 315.

The respondent agrees with the petitioner that not all deletion of matter proposed to be broadcast is censorship. (Petitioner's brief, p. 19). The respondent has a responsibility to avoid the commission of a criminal offense through the broadcast of certain materials over its facilities but the refusal to participate in the broadcast of "obscene, indecent or profane" language (18 USC 1464), or language which would advocate the overthrow of "any government in

the United States by force or violence" (18 USC 2385), or broadcasts which would counsel "insubordination, disloyalty, mutiny or refusal of duty by any member of the military or naval forces of the United States" (18 USC 2387) is not the imposition of a "prior restraint" historically regarded as the essence of censorship. *Near* v. *Minnesota,* 283 U.S. 697, 75 L ed 1357.

These acts which are prohibited are carefully defined public offenses and the questions of truth or falsity are not involved in them. Were the statutes prohibiting them "vague, indefinite or uncertain," they would violate the Fourteenth Amendment. 82 CJS 108.

We agree with the petitioner's statement (Plaintiff's brief, p. 23) that the Commission is not exercising the power of censorship in violation of Section 326 of the Federal Communications Act when it refused to license a station which has a record of defamation. We do not think the point germane to the issues in this case.

Point III.

The Argument Advanced in the Petitioner's Brief, Point II, "Section 315 of the Federal Communications Act Gives No Immunity to a Licensee for Broadcasting a Candidate's Defamatory Statements" Has Been Anticipated and Discussed at Length in the Amicus Brief at Point IV.

Point IV.

The Petitioner Raises in its Points III and IV the Problem That the Respondent Finds Most Difficult of Disposition, Not Because the Respondent Doubts Its Legal Position, But Because It Believes That the Petitioner as Well as the Individuals Attacked by Townley Are, in Fact Without Practical Recourse If Townley Cannot Respond in Damages.

The respondent regrets that its facilities have been used and, under the law, may well be used again, as an instrument of defamation. In amelioration it may be noted that during the election campaign in which the broadcast was used, Senator Young received 155,305 votes, Townley received 937 votes and Quentin Burdick received 87,919 votes. In the following campaign in 1958, Mr. Burdick was elected to Congress with 99,562 votes and Townley, who was again a candidate, this time for Congress, received only 1,700 votes. The extent of the real damage suffered by the petitioner and Senator Young and Mr. Burdick has yet to be determined.

We are unable to subscribe to the idea advanced by the petitioner that "innocent by-standers" should have a more sheltered position than a candidate for political office. Both are citizens and are entitled to equal treatment under the law. However, as citizens both parties participate in the benefits that Congress felt would flow from Section 315. Neither party has any constitutional right to be defamed only by a person who can respond in damages and yet it may well be that the size of Townley's vote evidences his standing before the electorate vis-a-vis the petitioner. This may be the result that Dean Pound had in mind when he said, "What the law has been trying to

do is to adjust relations and order conduct so as to give the most effect to the whole scheme of expectations of men in civilized society with a minimum of friction and waste. Often the best that it has proved able to do is to work out a rough compromise between conflicting expectations urged in good faith and confident belief in the intrinsic rightfulness by strong groups or insistent individuals." (*Justice According to Law*, p. 29, Roscoe Pound, Yale University Press, 1951.)

Another writer suggests, "A federal fund should be established to be administered by the FCC. Defamed parties who are unable, after diligent efforts, to obtain full satisfaction on a state judgment against the speaker, could make a claim to the Commission for the balance." (Zuckman, 34 NYULRev. 140.) But Congress has yet to adopt such legislation and the petitioner seems to be left with the "rough compromise" suggested by Dean Pound. It must look to the libelor rather than the disseminator for redress but it cannot, under the present state of the law, make an election between the libelor and disseminator or elect to seek damages from both.

We refer again to our statement of the case and express our belief that the facts in the instant case do not warrant a judgment based upon the usual lack of opportunity or ability to exercise editorial supervision; for the respondent here had full opportunity to exercise its discretion. We believe that the judgment in this case must be based upon the recognition of the unique characteristics of electronic communication culminating in television, which now dominates the world scene.

CONCLUSION

The judgment of the Supreme Court of North Dakota should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 248

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vs.

WDAY, INC., a Corporation,

Respondent.

On Writ of Certiorari To The Supreme Court of North Dakota

BRIEF OF THE NATIONAL ASSOCIATION OF BROADCASTERS AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

NATIONAL ASSOCIATION OF BROADCASTERS,
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BRIEF OF THE NATIONAL ASSOCIATION OF BROADCASTERS, AS AMICUS CURIAE, IN SUPPORT OF THE RESPONDENT

PRELIMINARY STATEMENT

This brief is filed with the written consent of the parties hereto, pursuant to Rule 42 of this Court, and is in support of the position of the Respondent, WDAY, Inc., and of the decision of the Supreme Court of North Dakota, reported at 89 N.W. (2nd) 102.

INTEREST OF AMICUS CURIAE

The National Association of Broadcasters (formerly the National Association of Radio and Television Broadcasters and hereinafter called the "Association"), is a non-profit organization of radio and television broadcasters whose membership included as of January 1, 1959, 1473 AM stations, 383 FM stations, 324 television stations, and all the radio and television nationwide networks. This brief is submitted in furtherance of the objective of the Association which, in accordance with its by-laws:

> "... shall be to foster and promote the development of the arts of aural and visual broadcasting in all its forms; to protect its members in every lawful and proper manner from injustices and unjust exactions; to do all things necessary and proper to encourage and promote customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public."

The particular phase of broadcasting before this Court concerns the rights, duties and responsibilities of broadcast licensees under Section 315 of the Communications Act of 1934, as amended.[1] Because the case at hand involves grave problems affecting not only the membership of this Association but all broadcasters throughout the United States, the Association has sought and received permission of the parties herein to appear as amicus so that it may present to the Court its views on a most critical problem. The Association does not believe that Section 315 of the Communications Act is necessary because of its view that the broadcaster can as well serve the public in

[1] 48 Stat. 1088, amended, 66 Stat. 717, 47 USC 315.

the field of political broadcasting, without legislative stricture, as he has done in all other fields of programming. Congress has nevertheless legislated on the subject. It is now up to this Court to determine the meaning and legal effect of that legislation.

SUMMARY OF ARGUMENT

1. Section 315 of the Communications Act of 1934, as amended, requires that once a broadcast licensee of the Federal Communications Commission has aired the speech of a duly qualified candidate for political office, he must afford equal opportunity, over his facilities, for political expression by all other duly qualified candidates for the same office. Section 315, in categorical terms, prohibits the licensee from censoring any of the utterances over his facilities of such candidates for office. This prohibition against censorship is complete and absolute and necessarily means that there can be no prior restraint by the licensee of any statements made by such candidate.

2. Since the inception, in 1927, of comprehensive, over-all regulation of interstate communication through radio, and later through television, by the federal government, there have been numerous attempts to amend Section 315 to afford the broadcaster specific statutory immunity from libel or slander suits due to the statements of candidates for office. These efforts commenced with the Radio Act of 1927 (and particularly Section 18 thereof which concerned political broadcasting) and carried over to amendatory efforts with respect to Section 315 of the Communications Act of 1934 which latter Section is, in effect, Section 18 of the old Radio Act. No legislation has been passed to effect the changes sought.

3. The Federal Communications Commission has categorically asserted that Section 315 has pre-empted the field of political broadcasting and that as a result not only is the licensee forbidden to censor, but that there comes into being an immunity from suit against the broadcaster for such libelous or slanderous statements as may be made over the station's facilities by a duly qualified candidate for public office.

4. The Congress of the United States has, by its acquiescence in administrative interpretation, (of which it was fully apprised) indicated its intent to be that immunity flows. Hence, there can be no doubt that the will of Congress, especially in view of the fact that Section 315 has been amended by Congress in other respects, was to bestow immunity to the exclusion of state legislation and state judicial pronouncements.

5. While there has been some split in the meager judicial decisions with respect to Section 315 in this particular area, the better-reasoned authorities stand for complete prohibition against censorship as well as complete immunity for the broacaster. These decisions stand squarely for the proposition that Congress could not have intended the inequitable result which would be reached if Section 315, intended to be a method of affording untrammeled freedom of political expression, were interpreted so as to require the holder of a broadcast license to, under mandate of law, allow the uncensored use of his facilities, while at the same time subjecting him to crippling litigation stemming from this free political expression.

6. If, however, Section 315 means that a broadcaster must, under mandate of law, subject himself to oppressive litigation in the area of political broad-

casting, resulting from lack of control over his facilities, it is then unconstitutional as a deprivation of due process under the Constitution of the United States. While liability without fault may be acceptable in some areas, the concept of liability without control is novel in our system of law, has no place in it, and should not be incorporated therein.

ARGUMENT

I.

THE COMMUNICATIONS ACT OF 1934, AS AMENDED, HAS COMPLETELY OCCUPIED THE FIELD OF INTERSTATE COMMUNICATIONS IN RADIO AND TELEVISION AND STATE AND LOCAL LAWS AND JUDICIAL DECISIONS IN CONFLICT THEREWITH ARE INOPERATIVE.

Based on past pronouncements of this Court, we believe it beyond dispute that Congress has fully occupied the field of communcations in radio and television to the complete exclusion of conflicting state legislation or judicial pronouncements. Nevertheless, because of the more particularized conclusions which we reach later concerning the specific problem before this Court, we feel that a discussion of established general principles regarding federal-state relationships in the area of regulatory occupancy would be appropriate. We generalize here, therefore, for purposes of later specification.

As this Court has held many times, it is clear that when Congress, acting pursuant to the powers granted it by the Constitution, has completely occupied a field of interstate regulation, local legislation in the field is precluded. *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, *Napier* v. *Atlantic Coastline Railroad Co.*, 272 U.S. 605, *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148, *Hines* v. *Davidowitz*, 312 U.S. 52, *Commonwealth of Pennsylvania* v. *Nelson*, 350 U.S. 497, *Allegheny Airlines, Inc.* v. *Vil-*

lage of Cedarhurst, 238 F. (2nd) 812 (C.A. 2 1956). Perhaps no statement is more apposite to this proposition than that of Mr. Justice Reed who, speaking for the Court in *Cloverleaf, supra,* stated (p. 156):

> "But where the United States exercises its power of legislation so as to conflict with the regulation of the state, either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its application."

Indeed, even where Congress has outlined its national policy in rather general and inclusive terms and has delegated determination of their specific application to an administrative tribunal, the mere fact of delegation of power to deal with the general matter, without agency action, might preclude any state action when it is clear that Congress intended no regulation except its own. *Oregon-Washington R. and Nav. Co.* v. *Washington,* 270 U.S. 87, *Bethlehem Steel Co., supra.* But where, however, as is the case here, federal administration has made comprehensive regulations effectively governing the subject matter of the statute, this Court has said that a state regulation in the field of the statute is invalid even though a particular phase of the subject has not been taken up by the federal agency. *Napier* v. *Atlantic Coastline R. Co., supra.*

We are not to suppose, however, that this phase of our argument must of necessity be validated by the cases cited because, in clear and unequivocal terms, this Court has specifically held that Congress has occupied the field of interstate commerce which is presently under consideration. In *Federal Communications Commission* v. *Pottsville Broadcasting Company,* 309 U.S. 134, 137, it was stated:

"Adequate appreciation of the facts presently to be summarized requires that they be set in their legislative framework. In its essentials the Communications Act of 1934 derives from the Federal Radio Act of [February 23] 1927, chap 169, 44 Stat. at L. 1162, as amended, July 1, 1930, 46 Stat. at L. 844, chap. 788, 47 USCA §96. By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry. The common factors in the administration of the various statutes by which Congress had supervised the different modes of communication led to the creation, in the Act of 1934, of the Communications Commission. But the objectives of the legislation have remained substantially unaltered since 1927."

and (p. 138):

" . . . [The Communications Act of 1934] expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission."[2]

Subsequently, in *National Broadcasting Company, Inc.* v. *United States*, 319 U.S. 190, Mr. Justice Frank-

[2] As a matter of fact, even before *Pottsville*, in *National Broadcasting Company, Inc.* v. *Board of Public Utility Commissioners of New Jersey*, 25 F. Supp. 761, 762 (D.N.J. 1938) a federal court had no difficulty in restraining New Jersey from proceeding under a state statute purporting to regulate radio broadcasting. In sustaining the contention that Congres had pre-empted the field by the Communications Act of 1934 thus ". . . *leaving nothing* for the State to control within this field . . ." the court concluded that ". . . this plaintiff is subject to regulation only by the Federal Communications Act and not by the New Jersey Radio Broadcasting Act . . ." (Italics supplied). See also *City of New York* v. *Federal Radio Commission*, 36 F. (2nd) 115 (C.A. D.C. 1929).

furter, delivering the opinion for the Court in connection with the Commission's then proposed "chain broadcasting rules", took occasion "In view of our dependence upon regulated private enterprise in discharging the far-reaching role which radio plays in our society . . ." (p. 193), to exhaustively review the past and then present federal legislation on the subject.

In affirming the regulatory concept outlined in *Pottsville, supra*, Mr. Justice Frankfurter went on (p. 215, 216) to point out that far from being ". . . a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other" the Commission was not restricted ". . . merely to supervision of the traffic" but had put upon it ". . . the burden of determining the composition of that traffic." Thus, if *Pottsville's* reference to ". . . a unified and comprehensive regulatory system for the industry" created any impression of mere moorage by the Commission to the electronics of the matter, *National Broadcasting Company, Inc.* v. *United States, supra,* completely destroyed it. Speaking further, the Court stated (p. 219):

> "While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields where the subject-matter

> of regulation was far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved."

Parenthetically, we are not unaware of the Court's phrase ". . . . Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry . . ." nor of its possible application. But the Court's later decision in *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120, pinpoints the matter. There, this Court in upholding the power of a state to deal with a fraudulent contract, even though a federally licensed radio station was involved, had this to say (p. 131):

> "The result may well be the termination of a broadcasting station. The Communications Act does not explicitly deal with this problem, and we find nothing in its interstices that dislodges the power of the States to deal with fraud merely because licensed facilities are involved."

We respectfully submit that there are no "interstices" in the Communications Act with respect to Congressional intent as to political broadcasting. Section 315 is an integral part of the warp and the woof of the fabric itself and ". . . dislodges the power of the States . . ." to deal with the subject. See also *Benanti* v. *United States,* 355 U.S. 96 and *Guss* v. *Utah Labor Relations Board,* 353 U.S. 1.

Allen B. Dumont Laboratories v. *Carroll,* 184 F. (2nd) 153 (C.A. 3 1950) cert denied, 340 U.S. 929, is an outstanding example of lower court thinking. In a sweeping decision the Third Circuit held that the Pennsylvania State Board of Censorship had no power

to censor films projected by the plaintiff, a broadcast licensee of the Federal Communications Commission. In a unanimous decision holding that the legislative history of the Act left no doubt but that it was the intention of Congress to occupy the television broadcasting field in its entirety because Congress was vitally concerned with the nature of programs broadcast as affecting the public good, the Court stated (p. 156):

> "It is clear from the foregoing that Congress was concerned with the *contents of the programs of all broadcasting stations including television transmitting stations,* and provided exemplary penalties, including loss of license and penal sanctions for the transgressor who should broadcast an indecent or obscene program. Congress did not intend to control *in advance* the broadcasting of radio programs but it did intend to prevent the transmittal of obscene matter through the ether. Program control was entrusted to the Federal Commission and it is an effective one . . . *We think it is clear that Congress has occupied fully the field of television regulation and that that field is no longer open to the States.* Congress possessed the constitutional authority to effect this result. Hines v. Davidowitz, 312 U.S. 52, 74, 61 S.Ct. 399, 85 L.ed 581. It follows that the Commonwealth of Pennsylvania cannot censor the films used on the programs of the plaintiff's stations." (Italics supplied).

Thus, we see here forceful rejection of an attempt by a state to enter into a specific area of broadcasting, namely, control of program content. Of course this does not and cannot mean that the Commission has the authority to censor programs.

II.

SECTION 315 OF THE COMMUNICATIONS ACT, BY VIRTUE OF ADMINISTRATIVE INTERPRETATION AND CONGRESSIONAL ACQUIESCENCE THEREWITH HAS PRE-EMPTED THE FIELD OF POLITICAL BROADCASTING AND ACCORDS TO THE BROADCASTERS AN AUTOMATIC IMMUNITY FROM DEFAMATORY UTTERANCES OF CANDIDATES FOR PUBLIC OFFICE.

Foreword

We need not attempt to spell out for this Court the absolute necessity for freedom of political expression—all of us recognize it and are dedicated to its fulfillment. In this case, however, we face the critical consideration of whether that freedom is to be hobbled because several of the media through which it is voiced may be stilled due to the interplay of conflicting interpretations. We believe it meet, at this juncture, to present a few statistics which, while of no legal import, do indicate, as Justice Frankfurter put it, "the far-reaching role" that radio and television play in bringing to the people of the United States the fullest and fairest expression of political points of view.

Radio, from its small commercial beginnings, around 1925, when crystal sets were the order of the day, has swelled to an industry of such proportions that it is estimated that there are now 150 million receiving sets in the hands of the public. Some 3,300 AM and 562 FM stations are almost constantly in operation with the net result that there is practically no area in the United States where commercial radio emissions, intended for free reception by the general public, cannot be heard. Television, an infant ten years ago, has grown at a fantastic pace: today approximately 528 stations are now in operation so that more than 80% of the American public has available the free offerings

of one or more television stations. There is hardly an area in the United States where at least one television signal cannot be received and additional stations are authorized but not yet in operation. Moreover, the genius of the electronics art is far from exhausted. In other terms, some 47,000,000 television receiving sets are in the hands of the public. Before too long, the above figures will be understatements.

These are simple statistics—but inherent in them is the indisputable intangible that radio and television as media of mass communication, have no equal. This stems, in great part, from the immediacy of the media: a thing is said and done and is heard and seen simultaneously with its occurrence; a political convention takes place and the American public is there; a Congressional inquiry is held in Washington and America sees its legislators in action. Indeed, some courts have held the dissemination of news concerning public affairs to be of such overriding public interest and hence so vital to the continuance and augmentation of an understanding and enlightened citizenry that, under court-controlled conditions, telecasts of actual trials have been permitted.[3] The televising of local assemblies and legislators at work is becoming commonplace.

The particular phase of broadcasting presently before this Court involves political speeches by candidates for public office. No matter what the candidate says or does, he has been heard and seen. Thus, to all intents and purposes, the hustings are in the home. It is no idle statement to say that perhaps no one knows this better than the candidate or his political party for, in the 1956 federal elections alone, it has

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[3] *In re Hearing Concerning Canon 35*, 296 P. (2nd) 465 (1956).

been estimated that approximately $10,000,000 was spent for radio and television time. Of more realistic import, however, insofar as operation by the licensee is concerned, are these figures: According to the result of a questionnaire recently sent out by this Association to its membership, in the twelve months prior to July, 1958, 849 of the stations responding reported a collective total of 12,772 radio and television political speeches by candidates for public office. We believe these figures to be of special significance inasmuch as they reflect a period of time during which there were no federal elections and few state-wide campaigns. Hence, the tremendous importance of the media in the political area is too obvious to labor. They constitute, indeed, " . . . the way people are reached." *Saia* v. *New York,* 334 U.S. 558, 561. We respectfully submit, therefore, that state legislation or judicial pronouncements which impede the free flow of political expression must give way to the over-all public interest concept of letting the people know. It is no wonder then, that the Federal Communications Commission has rightfully held that the broadcaster in fulfilling his duty as a conduit must of necessity be free of exposure to litigation.

Commission Interpretation of Section 315

We have shown that the Congress of the United States has pre-empted the over-all field of interstate communications. We now turn to specifics and reach the nub of this case: Has Section 315 itself occupied the field to the exclusion of state regulatory power? We think so, for the whole history of the Section as interpreted by the Commission itself, as acquiesced in by Congress, and as interpreted by the courts unequivocally substantiates this belief. Taking first

things first, we propose to, as briefly as possible, touc upon the Commission's pronouncements in this area.

Since 1927, when the Federal Radio Act[4] came int existence, there has been federal legislation on th subject of political broadcasting and it has not, insofa as this case is concerned, varied substantively. This i true because when, in 1934, the Federal Communica tions Commission was created to succeed the old Fed eral Radio Commission, Section 18 of the Federa Radio Act was lifted bodily therefrom and incor porated in the Communications Act of 1934 as Sectio 315. Moreover there has been unvaried and consisten administrative interpretation for some thirty-on years. There was even a time, as we will show, whe the Commission might be said to be seeking Congres sional action in order to obviate ambiguities said t exist in Section 315—but this opportunity was neve seized upon by the Congress with the result that fla consistent and categorical administrative fiat has le no doubt as to the Commission's position.

The *Matter of Port Huron Broadcasting Co.*, 4 Pik & Fischer RR 1 (1948), squarely raised the proble of whether libelous material might be excised, by licensee, from the broadcast speech of a candidate fo political office. In an exhaustive opinion, treating o the legislative history of Section 315 both from its origi in the Federal Radio Act as Section 18 and its sub sequent incorporation into the Communications Ac of 1934, the Commission held unequivocally that th prohibition contained in the Section constituted a occupation of the field by federal authority whic

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[4] Radio Act of 1927, § 18, 44 Stat. 1170.

under the law, would relieve the licensee of responsibility for any libelous matter broadcast in the course of a speech coming within Section 315, irrespective of state law. The Commission pointed out, of course, that the actual speaker still remained completely liable for the contents of his remarks. We believe it appropriate to here quote Commission rationalization of its holding (p. 5):

> "It is important in considering this matter to determine just what would be the inevitable consequences of accepting the view that a licensee should have the power to require candidates to delete 'possibly libelous matter.' In most political campaigns there are one or both of two basic issues before the public. On the one hand there is the question of the relative moral, intellectual and political integrity of the opposing candidates. On the other hand, in most cases the record of the persons and party in office is up for the voters' inspection. Thus the question of the personal honesty of one of the candidates or the motives behind the actions of one group of office holders may be, and often is, the principal area of contention between opposing candidates. This is not merely a question of 'mud-slinging'; the legality of certain questioned actions by one of the contesting parties in the election may well be the particular issue upon which the election does and should hang. These issues can only be brought before the public by statements of opposing groups. Such statements may or may not be libelous or slanderous. That will depend, in most cases, on whether the statements are true or false. But in every case of serious charges there is a possibility that the statement might be libelous or, even if not in fact libelous, might subject the station to suit.
>
> "This means that if licensees are going to take

it upon themselves to censor or restrict the broadcast of libelous material, they must either adopt a policy of requiring the elimination of all matter containing serious charges concerning the activities of opposing candidates or parties, which would seriously limit the effectiveness of radio broadcasting as a medium of political expression, or they must, in effect, set themselves up as the sole arbiter of what is true and what is false, what is in fact libel and what is not, an exercise of power which may be readily influenced by their own sympathies and allegiances. *The Commission does not believe that it was the intent of Congress to give the licensees any such power or responsibility with respect to political broadcasts.*" (Italics supplied).

The Commission, however, recognizing as it did in the above quotation the necessity of freedom of political expression, concluded by stating (p. 7):

"The argument has been advanced that such an interpretation of the Act cannot be correct, because it would leave the licensee in the completely untenable position of being forbidden to censor political speeches containing libelous or other actionable material and, at the same time, subject to damages for any libelous or actionable material in such broadcasts. But this argument not only has no basis in the legislative history of the Section as explained above, but is based on an assumption of the licensee's liability for the remarks made by political candidates speaking under the section which we do not believe is tenable. *For as we read the provisions of Section 315, the prohibition contained therein against censorship in connection with political broadcasts appears clearly to constitute an occupation of the field of federal authority, which, under the law, would relieve the licensee of responsibility for any libelous matter broadcast in the course of a speech*

coming within Section 315 irrespective of the provisions of state law." (Italics supplied.)

Thus, some ten years ago, the Commission gave unequivocal interpretation of Section 315. If, however, as the Commission noted in *Port Huron,* there had previously been disagreement as to the import of the Section, it was as nothing compared to the subsequent furor following the *Port Huron* decision itself. The outcry swelled to such proportions that the first order of business of a House Select Committee to Investigate the Commission was to go into the meaning and impact of the decision.[5] Neatly and succinctly the Chairman of the Committee expressed the Committee's concern when he said:

> "It has occurred to me and to members of the Committee that if we could in a measure resolve this dilemma that broadcasters find themselves in because of liability under State libel laws, at least until the courts could act on the question or until Congress could, in the next session, take some action, we would be rendering a service to the general public and to the broadcasting industry."

Despite this obvious concern, Congress did nothing and has done nothing regarding the matter to this day. This, however, was not the end of the trail insofar as the Commission was concerned. In a Memorandum Opinion and Order of November 27, 1951, *In The Matter of WDSU Broadcasting Corporation,* 7 Pike & Fischer RR 769, the Commission took occasion to forcefully re-assert, without equivocation, its holding in *Port Huron.* Had there been doubt before as to the

[5] Hearings before Select Committee to Investigate the Federal Communications Commission pursuant to H. Res. 691, 80th Cong., 2nd Sess, 7 Pike and Fischer RR 771.

meaning of that holding, *WDSU* deftly and finally excised it—and this in the context of the Commission's taking administrative notice of Congressional inaction. In *WDSU*, the station involved, on advice of counsel, expunged what it felt to be defamatory material contained in the script of a political speech. While renewing the station's license, the Commission, nevertheless, had this to say (p. 770):

> "We do not see how Congress could have made it any clearer than it did in the proviso of § 315 that a licensee may not censor the broadcast of a legally qualified candidate for public office. We stated in the case of In re Port Huron Broadcasting Co., 4 RR 1, 7, and we take this opportunity to reiterate, that the prohibition is 'absolute and no exception exists in the case of material which is either libelous or which might tend to involve the station in an action for damages.'"

Finally the Commission concluded, in no uncertain terms (p. 773):

> "We have stated what we believe to be the proper interpretation of § 315 in the Port Huron decision. No statute supplanting the existing law and our interpretation of it has been enacted by Congress. We, therefore, think there is no longer any reason to defer application of what we believe § 315 to require in any case of censorship of political broadcasts, and hereafter we will not accept the plea of doubt and uncertainty in the state of the law as a reason for not administering the law as we read it. Nor will we accept the argument that state statutes or common law on the subject of libel in some way supplant or modify the unqualified pronouncement of Congress on the use of the interstate facilities of radio by candidates in making political broadcasts.
>
> "We will, however, in the future, consider that

there is no open question with respect to censorship on the part of the licensee of material broadcast under § 315, and licensees will be expected to abide strictly by the provisions of that section."

We fail to see how the Commission could more clearly state the proposition that, in its opinion, a broadcast licensee can neither censor nor suffer damages for failure to do so.

The question, of course, will be asked; why, in the light of the controversial nature of Section 315, (and by the terms of the Section itself) the broadcaster does not avoid its pitfalls by an across-the-board refusal of all political broadcasts. The Commission has furnished a positive answer—and, because that answer is so unequivocal, we think it best to relate it, chronologically, and where appropriate, in the Commission's own words. First, in 1947, the Commission, *In The Matter of Homer P. Rainey,* 3 Pike & Fischer RR 737, had occasion to discuss a situation wherein certain licensees had adopted a joint policy of restricting political discussions by candidates to a stated amount of equal time. While there was no question present of a Section 315 violation, the Commission took the opportunity, in actuality, to read into Section 315 overall operational concepts which are not to be found in the literal terms of the Section. Thus, the Commission declared (p. 742):

"It appears that the amount of time available for political broadcasts had been set well in advance of the actual campaign and without particular attention having been given to the needs or public interest involved in the particular campaign. In view of the importance of the primary election in Texas, and further, since the licensees well knew that in the 1946 primary relatively few

of the candidates for state-wide office would desire to purchase time over the networks, *these restrictions do not appear to bear a reasonable relationship to the needs or public interest* in the particular campaign." (Italics supplied)

From *Rainey*, the Commission proceeded, in 1949, to its sweeping *Report On Editorializing By Broadcast Licensees*, 1 Pike & Fischer RR 201 (pt. 3). While the *Report* did not specifically deal with political broadcasts it constituted, and still constitutes today, Commission policy with respect to the manner in which public issues (which obviously include political broadcasts) should be presented. The *Report*, basically, addressed itself to the general proposition of the right of any licensee to air his personal views on any given matter over the facilities of his station. In determining the existence of this right, but as limited by the dictates of over-all fairness of presentation, the Commission declared (p. 204):

"The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community. It is this right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foun

dation stone of the American system of broadcasting."

The Commission, in discussing "the paramount right" of the public, clearly delineated a responsibility on the part of broadcast licensees to provide reasonable amounts of time for the presentation and discussion of public issues. This requirement, the Commission held, was in clear keeping with the necessity of assuring to the listening public an opportunity to hear varying opinion on issues facing them. That the election of officials to public office is an issue of prime importance is self-evident.

These edicts are not sterile. In, for example, *The Matter of the City of Jacksonville*, 12 Pike & Fischer RR 1113 (1956) which was a comparative hearing for television facilities, an applicant was denied on the ground, among others, that it had permitted no political broadcasts over its radio station—and this despite the fact that there were six other radio stations in the community which provided ample time. Of special interest in this case is the fact that the Commission, although it has over the years constantly stated to its licensees that it will not substitute its judgment for theirs, nevertheless did that very thing in this holding: The particular applicant involved gave the Commission as reasons for its policy that, in the judgment of the City Commission (which operated the station), the other six stations provided ample political broadcasts and that, also, the City Commission wished to prevent ". . . any inference that the political views expressed were those of the City Commission." Certainly to us, as broadcasters, the policy so adopted was clearly reasonable: There were ample media for political expression and an understandable desire on the

part of the city to be non-partisan. Yet the Commission judged (p. 180j) that ". . . notwithstanding the reason for adopting the policy, a degree of inattentiveness to matters of local interest has inevitably resulted."[6]

As final evidence of a situation ". . . when federal administration has made comprehensive regulations effectively governing the subject matter of the statute . . .", *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 774, we would refer the Court to the Commission's Public Notice 63585, FCC 58-936, October 1, 1958, *Use of Broadcasting Facilities By Candidates for Public Office (Revised)*. This document, as characterized by the Commission (p. 1), is ". . . a codification of the determinations of the Commission with respect to the pro-

[6] See also the Commission's letter of July 30, 1958, to *Honorable Samuel E. Stratton, Schenectady, New York*, in connection with a protest against a station which limited itself to political spot announcements because there were "too many contests". The Commission there stated:

> "*Without passing on the facts of the instant case; a general policy on the part of a station in refusing to carry any broadcasts by candidates for public office or broadcasts with respect to any particular office may raise a question as to whether such station is fulfilling its obligation to serve the public interest.* Such questions of course depend upon the facts of each case, including but not necessarily limited to such matters as the significance of the particular contest, the interest of the public in the station's listening or viewing area therein, the number of legally qualified candidates, etc. *In making such judgments, the primary responsibility must necessarily rest with the station licensee*, and the reasonableness of such decisions are usually considered in connection with applications for renewal of license, when the Commission reviews the overall operations of the station licensees." (Italics supplied.)

lems which have been presented to us and which appear likely to be involved in future campaigns" and has as its purpose ". . . the clarification of licensee responsibility and course of action when situations discussed herein are encountered." The document then goes on to set forth pertinent Commission Rules and Regulations relating to Section 315. Thereafter, the Commission propounds some sixty-one questions and answers them. They cover all phases of licensee activity in the area of political broadcasting and touch upon such things as the type of programs coming within the Section, who is a legally qualified candidate, when are candidates opposing candidates, what constitutes equal opportunities, what is a "use" under Section 315, what limitations can be put on that use, and what rates can be charged candidates for programs under the Section.[7] Moreover, the Commission made it eminently clear that in addition to the Section 315 aspects of political broadcasting, its report, *"Editorializing By Broadcast Licensees," supra,* still applied to the same area. Here is what the Commission has to say in this regard (p. 1):

> "It is to be emphasized that this discussion relates solely to obligations of broadcast licensees under Section 315 of the Communications Act and is not intended to treat with the wholly separate question of the treatment by broadcast licensees

[7] Question #43 asks whether a station may delete material in a Section 315 broadcast because it believes that the material contained therein is or might be libelous. The answer is "no", citing *Port Huron* and *WDSU, supra.* Question #44 asks whether a station is liable for libelous remarks of a political candidate. In answering, the Commission cited *Port Huron*, and in addition, the decision of the court below in this case, together with the more recent decision in *Lamb* v. *Sutton*, 164 F.Supp. 928 (D.C. Tenn. 1958)

in the public interest of political or other controversial programs or discussions not falling within the specific provisions of that section. With respect to the responsibilities of broadcast stations for insuring fair and balanced presentation of programs not coming within section 315, but relating to important public issues of a controversial nature including political broadcasts, licensees are referred to the Commission's Report, "Editorializing by Broadcast Licensees" (Vol. 1, Part 3, R. R. 91-201) and the cases cited therein. *In this respect it is particularly important that licensees recognize that the special obligations imposed upon them by the provisions of section 315 of the Communications Act with respect to certain types of political broadcasts do not in any way limit the applicability of general public interest concepts of political broadcasts not falling within the provisions of section 315 of the Communications Act. On the contrary, in view of the obvious importance of such programming to our system of representative government it is clear that these precepts, as set forth in the Report referred to above, are of particular applicability to such programming.*" (Italics supplied)

In concluding this portion of our brief, we note that this Court has consistently taken the position that ". . . settled administrative construction is entitled to great weight and should not be over-turned except for cogent reasons", *United States* v. *Chicago, North Shore and Milwaukee Railroad Company*, 288 U.S. 1, 13. Put another way, this Court declared in *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315:

> "True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. True it also is that administrative practice, con-

> sistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. United States v. Moore, 95 U.S. 760, 763, 24 L.ed. 588, 589; Logan v. Davis, 233 U.S. 613, 627, 58 L. ed. 1121, 1128, 34 S. Ct. 685; Brewster v. Gage, 280 U.S. 327, 336, 74 L. ed. 457, 462, 50 S. Ct. 115; Fawcus Mach. Co. v. United States, 282 U.S. 375, 75 L. ed. 397, 51 S. Ct. 144; Interstate Commerce Commission v. New York, N.H. & H.R. Co., 287 U.S. 178, ante, 248, 53 S. Ct. 106."

It is our belief that the Commission has given consistent interpretation for many years to Section 315 and that, therefore, unless this Court can, for constitutional reasons, find Section 315 invalid, the interpretation placed upon it by the Commission should stand. As Mr. Justice Roberts aptly stated (p. 14) in *Chicago, North Shore, and Milwaukee Railroad Co., supra*:

> "At this late date, the courts ought not to uphold an application of the law contradictory of this settled administrative interpretation."

Congressional Intent and Acquiescence

We do not intend to burden this Court with a discussion of the myriad extrinsic aids to legislative interpretation which could possibly be used in seeking congressional intent behind Section 315. In the field of statutory construction, no matter what the case may be, any advocate may find himself navigating in such cross-currents as to make precise land-fall difficult. When one recognizes that such aids as committee hearings, committee reports, proposed amendments, congressional debates, President's comments, draftmen's notes, and lobbyist views have all been considered at one time or another as possible sources of light on con-

gressional intent, the truly esoteric nature of the art becomes apparent.[8] While some of these may be brought into play in this case, our considered view is that these methods of construction are here completely peripheral because, to us, it is apparent that only two core arguments apply, namely: 1) that Congress, by virtue of its inaction, has acquiesced in the administrative interpretation given Section 315 by its statutory arm, the Commission, and 2) that Congress cannot be presumed to have intended the monstrous and inequitable result arising from passage of a law which at one and the same time requires a broadcaster to air political expression but places him in jeopardy because of his legal inability to restrain defamatory utterances contained therein.

Since 1927 there have been at least seventeen bills introduced either in the House or the Senate to relieve broadcast licensees from, as one bill put it, "... criminal or civil action by reason of any uncensored utterances broadcast."[9] None have passed. Quite frankly, we do not believe that the "... sheer pressure of other and more important business"[10] thwarted passage of amendatory legislation. The true fact of the matter is that Congress has always been quite aware of the problem and has had ample opportunity to act. We have seen, for example, that the matter was squarely brought

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[8] Newman and Surrey, Legislation, Cases & Material, p. 648-651, inclusive, (1955).

[9] Interestingly, the just quoted language was sought to be incorporated in the Radio Act of 1927, H.R. 9971, 69th Cong., 1st Sess., Paragraph 4 (Senate version). It was passed by the Senate but dropped in Conference.

[10] Mr. Justice Rutledge, concurring, *Cleveland* v. *United States*, 329 U.S. 14, 22.

to the attention of Congress in the 1948 hearings.[11] The most emphatic nature of the 1948 presentation to Congress is all the more marked, therefore, when one considers the actual passage of amendatory legislation to the Communications Act in 1952. These amendments, of great substantive and procedural import, *included an important change in Section 315 itself.* The specific changes made to Section 315 involved adding sections (b) and (c) which, respectively, related to, in effect, prohibiting the charge of premium prices for political broadcast time to candidates and authorization to the Commission to prescribe appropriate rules and regulations to carry out the provisions of Section 315. (This latter was simply a re-arrangement of already existing 315 authority.)

That Congress, in this one and only amendment of Section 315 since its original passage, was thoroughly aware of the problem presently before this Court is illustrated by the pointed colloquy between then Chairman Coy of the Commission and Representative O'Hara in the hearings on S. 658, which became the 1952 amendments.[12] During his testimony on the bill, Chairman Coy had this to say (p. 134):

> "Mr. Coy . . . *The Commission's interpretation of section 315, where it says there shall be no censorship, is that there shall be no censorship; yet the stations in the various States of the country are censoring political broadcasts for defamatory and libelous material because under State law they believe that they are liable for libel and defamation.*

[11] Select Committee to Investigate the FCC, P. 11, *supra.*

[12] Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 82nd Cong., 1st Sess., on S. 658, April 1951.

"The Commission's position is that the Federal enactment of section 315 has clearly invaded the field and that the State statutes fall before the Federal enactment . . .

"Mr. O'Hara. That does not relieve the station or the speaker from liability for defamation or libel. I am speaking about section 315, the one that you referred to where you say that there shall be no censorship. *The thing that I want to know is, does section 315 repeal the laws of libel and defamation?*

"Mr. Coy. *Our contention is that it does.*

* * * * *

"Mr. Coy. *Mr. O'Hara, I have been mistaken. The political candidate is liable for libel. The broadcaster is not . . .*" (Italics supplied)

Some seven months after Mr. Coy's appearance before the House Committee on Interstate and Foreign Commerce, but before final passage of the 1952 Amendments, the Commission issued its opinion in *WDSU, supra.* Here the Commission in categorical terms declared (p. 773):

"We have stated what we believe to be the proper interpretation of Section 315 in the Port Huron decision."

We have demonstrated that *Port Huron, supra,* relieved ". . . the licensee of responsibility for any libelous matter broadcast in the course of a speech coming within Section 315 irrespective of the provisions of state law."

It is our deep belief that, unless, as we have previously stated, this Court can on a broader basis find Section 315 unconstitutional (a point which we will discuss, *infra*), Congress has through its affirmative

action in re-enacting Section 18 of the Radio Act of 1927 as Section 315 of the Communications Act of 1934, through its (in practical effect) re-enactment of the pertinent portions of Section 315 in the 1952 Amendments, and through its obvious refusal to change that Section despite its clear knowledge of administrative interpretation thereof, demonstrated clearly its acquiescence with the Commission's interpretation of the Section. In sum, Congress has indicated that the Commission has given correct expression to Congressional intent. We submit that Congress cannot be said to have been operating *in vacuo* in 1934, 1948 and 1952, when it took the affirmative legislative steps we have discussed.[13]

We believe that *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, *Massachusetts Mutual Life Insurance Co.* v. *United States*, 288 U.S. 269, *National Lead Co.* v. *United States*, 252 U.S. 140, *Poe* v. *Seaborn*, 282 U.S. 101, *McCaughn* v. *Hershey Chocolate Company*, 283 U.S. 488, *Costanzo* v. *Tillinghast*, 287 U.S. 341, *Skidmore* v. *Swift Co.*, 323 U.S. 134, and *Zellerbach Paper Co.* v. *Helvering*, 293 U.S. 172, support our view. *Norwegian* tells us (p. 313) that "Acquiescence by Congress in an administrative practice may be an inference from silence during a period of years." And we think it particularly pertinent that here, as in *Norwegian*, ". . . the inference is strengthened when it is recalled that during some of those years the Commission was under fire." *Massachusetts*, too, is most pertinent, for there Congress in the Revenue Acts of 1928 and 1932 re-enacted a particular section without

[13] Nor must it be forgotten that in the interim periods numerous amendatory bills were introduced which never came to fruition.

alteration but "... with knowledge of the construction placed upon the section by the official charged with its administration." This Court held (p. 273):

> "If the legislative body had considered the Treasury interpretation erroneous, it would have amended the section. Its failure so to do requires the conclusion that the regulation was not inconsistent with the intent of the statute (National Lead Co. v. United States, 252 U.S. 140, 146, 64 L. ed. 496, 499, 40 S. Ct. 437; Poe v. Seaborn, 282 U.S. 101, 116, 75 L. ed. 239, 245, 51 S. Ct. 58; McCaughn v. Hershey Chocolate Co., 283 U.S. 488, 492, 75 L. ed. 1183, 1186, 51 S. Ct. 510; Costanzo v. Tillinghast, 287 U.S. 341, ante, 350, 53 S. Ct. 152) unless, perhaps, the language of the act is unambiguous and the regulation clearly inconsistent with it. Compare Louisville & N. R. Co. v. United States, 282 U.S. 740, 757, 758, 75 L. ed. 672, 683, 684, 51 S. Ct. 297. The petitioner insists that the statute needs no interpretation and its plain mandate should be enforced. But on examination the proper application of the section is not so clear as is claimed."

We see little difference between the factual situation in *Massachusetts* and that here present: In both cases Congress re-enacted a specific portion of prior legislation without change but with knowledge of long-standing and consistent administrative interpretation placed upon it. Moreover, the language of Section 315 is neither ambiguous nor is the Commission's interpretation thereof inconsistent with it. Turning to *McCaughn, supra,* we hear the Court, speaking through Justice Stone, (p. 492, 493):

> "The re-enactment of the statute by Congress, as well as the failure to amend it in the face of consistent administrative construction, is at least persuasive of a legislative recognition and ap-

proval of the statute as construed." See National Lead Co. v. United States, 252 U.S. 140, 146, 64 L. ed. 496, 499, 40 S. Ct. 237. We see no reason for rejecting that construction."

And again, in *Zellerbach; supra,* Justice Stone, speaking for the Court stated (p. 179, 180):

> "Successive revenue statutes have been enacted without substantial change in the applicable sections. Congress seemingly has been satisfied with the Decisions of the Treasury and with the interpretation of its own meaning implicit in them. National Lead Co. v. United States, 252 U.S. 140, 146, 64 L. ed. 496 499, 40 S. Ct. 237; McCaughn v. Hershey Chocolate Co., 283 U.S. 488, 492, 493, 75 L. ed. 1183, 1186, 1187, 51 S. Ct. 510; Costanzo v. Tillinghast, 287 U.S. 341, 345, 77 L. ed. 350, 353, 53 S. Ct. 152; Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315, 77 L. ed. 796, 807, 53 S. Ct. 350."

The latest pertinent ruling of this Court, of which we are aware, is *Federal Housing Administration v. Darlington, Inc.,* —— U.S. ——, 3 L. ed. 132 (November 24, 1958). There this Court in dealing with (p. 137) the contemporaneous construction of the Act by the agency entrusted with its administration, which this Court felt to be "squarely to the contrary," had this to say (p. 137):

> "In circumstances no more ambiguous than the present we have allowed contemporaneous administrative construction to carry the day against doubts that might exist from a reading of the bare words of a statute. See United States v. American Trucking Assos. 310 U.S. 534, 549, 84 L. ed. 1345, 1354, 60 S. Ct. 1059; Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315, 77 L. ed. 796, 807, 53 S. Ct. 350. When Congress passed the 1954 Amendment, it accepted the con-

> struction of the prior Act which bars rentals to transients. Subsequent legislation which declares the intent of an earlier law is not, of course, conclusive in determining what the previous Congress meant. But the later law is entitled to weight when it comes to the problem of construction. See United States v. Stafoff, 260 U.S. 477, 480, 67 L. ed. 358, 360, 43 S. Ct. 197; Sioux Tribe v. United States, 316 U.S. 317, 329, 330, 86 L. ed. 1501, 1509, 62 S. Ct. 1095. The purpose of the Act, its administrative construction, and the meaning which a later Congress ascribed to it all point to the conclusion that the housing business to be benefited by FHA insurance did not include rental to transients."

Before leaving this portion of our argument, we are constrained to point out that it would be unthinkable to attribute to Congress intent to create the paradoxical situation which would arise if Section 315 were interpreted to not afford immunity to the broadcaster. We cannot conceive of a body more keenly aware of the necessity for unhampered political expression and more dedicated to preserving it than the Congress of the United States. Senator Howell in the Senate debates on H.R. 9971, which ultimately became the Radio Act of 1927, went directly to the heart of the matter when, in voicing a plea for unrestricted presentation of opposing points of view stated: "Give me control of the character of the matter that goes out over our broadcasting stations and I will mold the views of the next generation."[14] The North Dakota Court, in viewing the other side of the coin, succinctly stated:

> "We cannot believe that it was the intent of Congress to compel a station to broadcast libelous statements and at the same time subject it to the risk of defending actions for damages."

[14] 67 Cong. Record (Part 11) 12504

Any other conclusion, in our view, would fly squarely in the face of the settled principle of statutory construction enunciated by this Court in 1869 in *United States* v. *Kirby*, 74 U.S. 278, 280, that:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence . . . The reason of the law, in such cases, should prevail over its letter."

This principle has been fortified by this Court over the years. *Lau Ow Bew* v. *United States*, 144 U.S. 47; *Oates* v. *First National Bank of Montgomery*, 100 U.S. 239; *United States* v. *Ryan*, 284 U.S. 167; *Sorrells* v. *United States*, 287 U.S. 435; *Rathbun* v. *United States*, 355 U.S. 107. We feel, as this Court did in *Benanti* v. *United States*, 355 U.S. 96, 102, that to construe Section 315 otherwise would be giving the Section ". . . a self-defeating, if not disingenuous purpose."

III.

THE DECISION OF THE COURT BELOW, SUPPORTED BY THE BETTER-REASONED LINE OF AUTHORITIES, IS CORRECT IN HOLDING THAT THE BROADCAST LICENSEE IS IMMUNE FROM SUIT FOR DEFAMATORY UTTERANCES MADE OVER HIS FACILITIES BY LEGALLY QUALIFIED CANDIDATES FOR PUBLIC OFFICE.

We have shown that Commission interpretation and Congressional acquiescence therewith have closed the circle and that the broadcaster finds himself in its very center: By virtue of federal law, he must allow publication of defamatory material or sustain loss of license. On the other hand, he is prey to litigation for libel, unless immunity flows to him. We have shown, too, we believe, that by no stretch of the imagination can Congress have intended conception of such a distorted and inequitable situation. Indeed, the very existence of such a hard circumstance would threaten the work-

ability of the uniform system of regulation which Congress felt necessary if this complex field of interstate communication was to function properly. Hence, it must be, and the courts have so held, that any state legislation with respect to libel or slander or any state judicial decisions in conflict with Section 315 must be held invalid as an encroachment upon federal occupation of the field.[15] Turning to the decision of the court below, we find it squarely hitting the mark in its statement that:

> "There is no ambiguity in Section 315 supra. It provides in clear and specific language that where candidates for political office are permitted to use the facilities of a station such station 'shall have no power of censorship.' "
>
> * * * * *
>
> "In the instant case the defendant WDAY was required by Section 315 to permit the broadcast of the Townley speech. Power to censor the speech was denied by the clear and specific language of Section 315. *We cannot believe that it was the intent of Congress to compel a station to broadcast libelous statements and at the same time subject it to the risk of defending actions for damages.*" (Italics supplied)

We are in complete accord with this holding.

Subsequent to the decision of the court below, the United States District Court for the Middle District of Tennessee, Nashville Division, in almost precisely the same factual situation as was present in *WDAY*, also

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[15] The actual speaker, is, of course, completely liable for his remarks. Section 315 does not affect this liability in any way nor protect the speaker against civil action for libel or slander or criminal prosecution arising out of his violation of any federal or state law.

held that the federal authority of Section 315 had so completely occupied the field and therefore displaced state authority that immunity was accorded to the licensee. As did the court below thoroughly explore Congressional intent and the Commission's Section 315 interpretations, so did Judge Miller in his decision in *Lamb* v. *Sutton*, 164 F. Supp. 928 (D. C. Tenn. 1958). He concluded that (p. 934):

> "It would appear to be in conflict with the clear purpose of Congress as expressed in Section 315 and as demonstrated by legislative history to deny to broadcasting stations any right to exercise control or censorship over the speeches of candidates for public office. It was evidently the belief of Congress that the denial of such right of censorship would contribute to the free and untrammeled discussion of public issues and would subserve the public interest. The ruling of the Nebraska Supreme Court would seriously impair the efficacy of the interdict against censorship and would introduce a distinction based upon the so-called partisan trend of the words which would be practically impossible to apply with any fair degree of certainty. *The Court is of the opinion that Congress under the Federal Communications Act of 1934, as amended, completely occupied and pre-empted the field of interstate communications in radio and television, and that from the censorship provision in Section 315 and other regulatory provisions of the Act, there results by necessary implication an an immunity of a broadcaster from liability for defamatory material broadcast by a legally qualified candidate.* Cf. Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 63 S. Ct. 172, 87 L. ed. 165; O'Brien v. Western Union Telegraph Co., 1 Cir., 113 F. 2nd 539." (Italics supplied.)

The opinion of the court below and that in *Lamb* are the two latest judicial pronouncements on the subject.

Their harmony of legal reasoning and holdings, coming as they did only a few months apart and, as noted, on practically identical factual situations are most persuasive, for we find no real disparity of thought on the same question as between the Supreme Court of a state and a Federal District court. But these two decisions do not stand alone. In the unreported case of *Yates* v. *The Associated Broadcasters, Inc.*, 7 Pike & Fischer RR 2088 (D.C. N.D. Cal. 1951) the licensee sought to avoid airing a political script which in its judgment was not in the public interest and might cause it to suffer suit if broadcast. Judge Carter in ordering that time be afforded the candidate, after hearing oral argument, made the following remarks (p. 2088, 2089):

> "It is the purpose of the statute to see that all sides of a political campaign have an equal opportunity to use the facilities of the station. That statute is designed to give free play to political campaigns and free play to the candidates to properly express their opinions to the voters . . . *There is no authority of censorship; as a matter of fact, there is no responsibility on the part of the station for what is said there. The station cannot be sued for libel and it has the right to make a disclaimer, which it does and can in no way be held responsible for what is said . . .*
>
> "What is in the script is the Committee's responsibility and not the station's, and if it happens to be Communist propaganda that has the name of a candidate for supervisor on it, that's not the fault of the station, and *the regulations as they are now presented or as they are now formulated simply give the courts no alternative.*" (Italics supplied.)

Again, in *Josephson* v. *Knickerbocker Broadcasting Co., Inc.*, 38 N.Y.S. (2nd) 985 (Sup. Ct. N.Y. 1942)

a political candidate was presented as required by Section 315. In the course of a speech, he libeled plaintiff. The defense was one of privilege because the station was required to carry the program. The Court held that the defense of qualified privilege under Section 315 was valid stating that:

> "Since the statute creates certain obligations and limitations, it is proper that the owner of the radio station be given corresponding qualified privileges against liability for statements which it has no power to control."

In *Charles Parker Co.* v. *Silver City Crystal Co.*, 142 Conn. 604, 116 A (2nd) 440, on the premise that "speech-making and broadcasting of speeches in an election campaign are on general principles, occasions for qualified privilege" the Court held that:

> "As to the defendant company, it was under a legal requirement to permit the broadcast. Its power to censor the script was prohibited. 48 Stat. 1088, 47 U.S.C. § 315 (1946); Donelly, 'Defamation by Radio: A Reconsideration,' 34 Iowa L. Rev. 12, 30, 38 n. 99; note, 61 Yale L.J. 87, 89. There is no reason why it should not be accorded the same qualified privilege as DePaola. Unless it could be shown that the defendant company maliciously permitted its facilities to be used, or that it knew that the facts stated were false and yet allowed the broadcast, or otherwise acted in bad faith, it too is shielded by the privilege. Josephson v. Knickerbocker Broadcasting Co., 179 Misc. 787, 788, 38 N.Y.S. (2d) 985; In re Application of Port Huron Broadcasting Co., 12 F.C.C. 1069, 1074."

As amicus, we would be derelict if we did not point out that there are decisions contrary to those cited above. While we do not agree with the rationale of

these cases, they nevertheless intensify uncertainty as to the present state of the law. A landmark case is *Sorensen* v. *Wood,* 123 Neb. 348, 243 NW 82 (1932), appeal dismissed *sub nom. KFAB Broadcasting Co.* v. *Sorensen,* 290 U.S. 599. There the Supreme Court of Nebraska construed Section 18 of the Radio Act of 1927, the forerunner of Section 315, and containing an identical censorship provision. The court rejected the theory of immunity, construing the censorship clause as preventing "... the licensee from censoring the words as to their political and partisan ..." trend but not as giving the licensee any privilege to join and assist in the publication of a libel nor as granting any immunity from the consequences of such action.[16]

In *Houston Post Company* v. *United States,* 79 F. Supp. 199, 203 (S.D. Tex. 1948), the Court stated, in terms of dicta, that the Commission's *Port Huron* decision was unauthorized and erroneous and that:

> "When, however, it appears: that the Supreme Court has not construed the section; that there is no body of judicial opinion interpreting it as the Commission has done, but such opinion as there is is directly to the contrary, and that prohibitions against censorship have been uniformly held not to prevent the control of language which is beyond the scope of guarantees of free speech, the view

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[16] *Lamb, supra,* specifically rejected *Sorensen* stating (p. 934):

"The ruling of the Nebraska Supreme Court would seriously impair the efficacy of the interdict against censorship and would introduce a distinction based upon the so-called partisan trend of the words which would be practically impossible to apply with any fair degree of certainty."

Actually, *Sorensen* is irrelevant for it does not deal with a candidate for public office.

that the Commission was issuing an order and not merely giving an opinion seems quite unfounded."[17]

This, then, is the quagmire of pertinent Section 315 cases in which the broadcaster must grope and often stumble—for most certainly the judicial signposts are far from being well illuminated. The decision below, with some reservations which we will later refer to, and *Lamb* v. *Sutton*, 164 F.Supp. 928 (D.C. Tenn. 1958), we believe to be correct. These decisions, in the light of cases hitherto cited, and other collateral decisions now to be discussed, confirm us in our belief that state power is displaced and immunity granted.

We suggest that *O'Brien* v. *Western Union Telegraph Co.*, 113 F. (2nd) 539 (C.A. 1 1940) is a thoroughly reasoned opinion completely apposite to the case before this Court. There Western Union transmitted "obviously defamatory statements" (p. 540), made in a political context, and, upon suit, pleaded privilege because of its status as an interstate common carrier. The court, in first determining (p. 541) ". . . the privilege of the defendant to transmit the libelous message in question . . ." found that it (the court) was bound neither by the law of Massachusetts, where the message was originated, nor by that of Michigan, where it was delivered. Said Judge Magruder (p. 541):

> "Congress having occupied the field by enacting a fairly comprehensive scheme of regulation, it seems clear that questions relating to the duties, privileges and liabilities of telegraph companies in the transmission of interstate messages must be

[17] See also *Daniell* v. *Voice of New Hampshire, Inc.*, 10 Pike & Fischer RR 2045 (Super. Ct., N.H. 1954). Cf. *Felix* v. *Westinghouse Radio Stations*, 89 F. Supp. 740 (E.D. Pa. 1950), reversed, 186 F. (2d) 1 (C.A. 3 1950), cert. denied, 341 U.S. 909.

governed by uniform federal rules. This conclusion is fortified by decisions under the Interstate Commerce Act, 49 U.S.C.A. § 1 et seq., which was applicable to telegraph companies prior to the passage of the Communications Act of 1934."

The court then proceeded to examine the regulatory law applicable to Western Union, namely, the Communications Act of 1934, and, more specifically, Section 202 (a) thereof. The court found that, while (p. 541) ". . . no provision of law expressly defines the duty of telegraph companies to accept and transmit defamatory messages . . .", nevertheless, such duty as does exist is "implicit" in the language of that Section of the Act.[18]

Then the court, balancing federal as against state law, in an area occupied by the federal government, declared that (p. 541):

> "It would seem that the corresponding liability or immunity of the telegraph company to the person defamed should likewise be determined by uniform federal rules in cases where the telegraph company does transmit and deliver the defamatory message. Notwithstanding Erie Railroad Co. v. Tompkins, 1938, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487, there still exist certain fields—and this is one—where legal relations are governed by a 'federal common law,' a body of

[18] "Sec. 202. (a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

decisional law developed by the federal courts untrammeled by state court decisions."

With this predicate, the court examined the public interest aspects of Western Union's interstate operation noting (p. 541) that its immunity from liability to a defamed person, when it transmitted a libelous message, ". . . must be broad enough to enable the company to render its public service efficiently and with dispatch." Moreover, the court found (p. 542) that the telegraph company's privilege could not be restricted to cases in which the sender was privileged but must be broader than that because, otherwise, ". . . the company for its own self-protection would have to be permitted to delay sending the message pending some kind of check-up of the circumstances to which the message relates." Such a process, the court found, would result in inevitable delays which would serve to defeat the very purpose for which the sender was given a privilege. Then the court in language of forceful relevance stated (p. 542, 543):

> "The courts have disagreed as to the relative importance on the one hand of the public interest in the selection of good men for public office, and in the disclosure by a citizen of relevant facts honestly believed to be true, without a paralyzing fear of libel suits, and on the other hand, of the private interest of the candidate in the preservation of his reputation as against unmerited attack. It would be preposterous to formulate a rule of privilege for telegraph companies based upon an assumption that the clerks and operators know the law of Massachusetts or of Michigan on the point, and if there is a diversity, which law governs on conflict of laws principles as applied to the facts of this case. And even as to points of law supposed to be reasonably well settled, it is impractical

> to impute a knowledge thereof to the busy clerks in telegraph offices. What would happen would surely be a slowing down of service while clerks, instead of mechanically counting the words in proffered messages, carefully scrutinized them to see if they conveyed any defamatory meaning. Any messages which were suspect would then have to be referred to some central office of the company where legal advice was available. Thus not only would the service suffer, and many messages be held up which ought to be sent without delay, but also in causing the message to be circulated through a hierarchy of reviewing employees, the company might often publish the defamatory matter to more persons than would have seen the message had it been transmitted to the sendee in ordinary course."

The court finally concluded that if the telegraph company is "ever" to be liable for the routine transmission of a defamatory message it could only be in the necessarily "rare" cases where the transmitting agent of the telegraph company happened to know that the message was spurious or that the sender was acting not in the protection of any legitimate interest but in bad faith and for the purpose of traducing another.

We feel that *O'Brien* is so analogous to the case at bar that its obviousness obviates further extended discussion. Implicit in Section 315, as interpreted by the Commission and acquiesced in by Congress, is the same compulsion to transmit as Judge Magruder found inherent in Section 202 (a).[19] The public interest concept is the same.[20] Moreover as Judge Magruder pointed out (by our own analogy) if every radio station operator

[19] Indeed, the language of Section 202 (a) is less forceful than that of Section 315.

[20] In practical effect, certainly more people are reached by radio and television in a political campaign than are by wire.

or announcer or manager were required to carefully scrutinize and make determinations as to the defamatory contents of contemplated political speeches, this would constitute a thoroughly impractical and unreasonable burden to place upon the licensee. As a matter of fact, this could well result, as the Solicitor General pointed out to this Court in his Memorandum for the United States on Petition for Writ of Certiorari in this case (p. 4), in ". . . sterility of broadcast political discussion." In this area of communication, any argument that differing legal results with respect to immunity flow from the fact that one of the media is a common carrier and the other a broadcaster is sheer sophistry. We have shown that the broadcast licensee is under the same governmental fiat.

We would also point to *Benanti* v. *United States;* 355 U.S. 96, as a holding by this Court which deals with a specific section of the Communications Act and which, if not factually in point, is, we believe, philosophically in accord with the interpretation given Section 315 by the decision of the court below and by the court in *Lamb* v. *Sutton,* 164 F. Supp. 928 (D.C. Tenn. 1958) In *Benanti* the Court dealt with the question of whether evidence obtained as a result of wire-tapping by state law enforcement officers, without participation by federal authorities, was admissible in a federal court. The statute involved was the Communications Act and, more particularly, Section 605 thereof which, as this Court knows, forbids the practice. The purpose of such a prohibition is, of course, to give the people privacy of communication and to protect them from prosecution based upon evidence gained by law enforcement officers through wire-taps of their conversations. The Court, speaking through the Chief

Justice and in noting that the Federal Communications Act is a ". . . comprehensive scheme for the regulation of interstate communication," (p. 132) consistently referred to ". . . the interests protected . . ." under Section 605 and the ". . . the statute's protection : . ." The Court noted that if it accepted respondent's argument, both interstate and intrastate communications would be removed from the statute's protection, and that obviously "Congress did not intend to place the protections so plainly guaranteed in Section 605 in such a vulnerable position." The Court then turned to the respondent's argument which pointed out that some portions of the Communications Act placed ". . . some limited authority in the States over the field of interstate communications." Dispositive of this argument was the court's flat assertion that (p. 132, 133):

> "The character of these matters, dealing with aspects of the regulation of utility service to the public, are technical in nature *in contrast to the broader policy considerations motivating § 605.* Moreover, the very existence of these grants of authority to the States underscores the conclusion *that had Congress intended to allow the States to make exceptions to § 605, it would have said so.* In light of the above considerations, and keeping in mind this comprehensive scheme of interstate regulation and the public policy underlying § 605 as part of that scheme, *we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy.* Cf. Pennsylvania v. Nelson, 350 U.S. 497, 100 L. ed. 640, 76 S. Ct. 477; Hill v. Florida, 325 U.S. 538, 89 L. ed. 1782, 65 S. Ct. 1373; Hines v. Davidowitz, 312 U.S. 52, 85 L. ed. 581, 61 S. Ct. 399." (Italics supplied.)

With respect to the case at bar, we feel that Section 315 contains the ". . . broader policy considerations . . ."

which the Court found motivated Section 605. The protection sought to be secured by Section 605 is no greater than the protection of freedom of political expression, without fear of suit, sought to be achieved in Section 315. And finally, as *Benanti* states, had Congress intended to allow the states to make exceptions to Section 315, it most certainly would have said so. The states, in our judgment, can no more contradict Section 315 and the policy inherent therein, by state legislation or judicial opinion, than they can Section 605.

Aligned also with the over-all juridical concept of the court's decision below, and *Lamb,* is this Court's decision in *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U.S. 173. There, this Court, in a decision considering the relationship of the patent and antitrust laws of the United States vis-a-vis possible application of a state legal doctrine, used this most significant language (p. 176):

> "It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L.ed. 1188, 58 S. Ct. 817, 114 A.L.R. 1487. There we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. Royal Indem. Co. v. United States, 313 U.S. 289, 296, 85 L. ed. 1361, 1366, 61 S. Ct. 995; Prudence Realization Corp. v. Geist, 316 U.S. 89, 95, 86 L. ed. 1293, 1298.

62 S. Ct. 978, 48 Am Bankr Rep (NS 695); Jackson County v. United States, 308 U.S. 343, 349, 350, 84 L. ed. 313, 316, 317, 60 S. Ct. 285; cf. O'Brien v. Western U. Teleg. Co, (CCA 1st) 113 F. (2d) 539, 541. When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless, federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. Const. Art. 6, cl 2; Awotin v. Atlas Exch. Bank, 295 U.S. 209, 79 L. ed. 1393, 55 S. Ct. 674; Dietrick v. Greaney, 309 U.S. 190, 200, 201, 84 L. ed. 694, 700, 701, 60 S. Ct. 480."

Applying this principle to the case at bar, we think it quite clear that the explicit prohibition against censorship contained in Section 315 ". . . may not be set at naught . . ." by any state statute or common law rules nor can the "benefit" of immunity which we have shown to be inherent in the Section be denied by state law or common law rules.

We believe we have shown that Section 315 of the Communications Act pre-empts the field and immunizes the licensee. The latest case we are aware of which sets forth *specific* tests of supersession is *Commonwealth of Pennsylvania v. Nelson*, 350 U.S. 497. There (pp. 502-506) the Court erected certain criteria which must be met, absent any explicit expression of Congressional intent and which, taken as a whole (p. 504) ". . . evince a congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it." The criteria are these: 1) The scheme of federal regulation must be so pervasive as to make reasonable the inference that Congress left

no room for the states to supplement it, 2) the federal statute must touch upon a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject, and, finally, 3) enforcement of state law would present a serious danger of conflict with administration of the federal program. Patently, Section 315 meets these tests—and all the more so when it is recognized that, in the case at bar, Congress, by its acquiescence, has made its intent eminently clear.

Comments On The Decision Below

We have prior to this indicated our support of and belief in the correctness of the decision of the Supreme Court of North Dakota. Our support, however, extends only to the proposition that the prohibition against censorship is absolute and that an absolute immunity is concomitant therewith. Unless this is what the North Dakota Court had in mind, we feel that we must comment on what may be inherent limitations contained in the decision. The basis for our doubt is this: In the first instance, we find ourselves faced with a syllabus "By the court", which states (Par. 2):

> "2. In inhibition against censorship imposed on broadcasting stations by Section 315, Title 47 USCA grants immunity to such stations from liability for defamatory statements made by candidates *where such statements are germane to the political issues discussed by such candidates.*" (Italics supplied.)

Nowhere in the *main body* of the decision, as far as we are able to ascertain, is this statement again made. Examination of North Dakota law discloses, however, that there is specific legislation on the subject of syllabi.

In the first instance, Section 102 of the North Dakota Constitution provides as follows:

> "It shall be the duty of the court to prepare a syllabus of the points adjudicated in each case, which shall be concurred in by a majority of the judges thereof, and it shall be prefixed to the published reports of the case."

Moreover, the North Dakota Revised Code (1943, 27-0223) provides as follows:

> "Decisions: Must Be Written; Filing; Syllabus; Requirement
>
> "The Supreme Court, in any case decided by it, shall give its decision in writing, which shall be filed with the Clerk of said court with the other papers in the case. A decision in a case heard at a general or special term, and all orders affecting the same, may be filed in vacation, and judgment entered thereon in pursuance of the finding and order of the court with the same effect as upon a decision made and filed in term. *Said court at the time of announcing its decision in any action determined by said court shall file with the Clerk thereof a syllabus of the decision in such action so prepared as to embody as briefly as practicable the principles settled in and by such decision.*" (Italics supplied.)

If, therefore, syllabus No. 2 is to be construed as part of the substantive law of the case, we feel it proper to here express our doubts as to the meaning of the decision in its entirety.

In paraphrase, the syllabus says that the broadcaster is prohibited from censoring only those statements of political candidates which are "germane to the political issues discussed" by such candidate. Immunity from suit flows to the broadcaster from these statements—

but it is apparent to us from the wording of the syllabus that where the statements are not "germane" the broadcaster may delete and if he does not, or if he misjudges the legal import of what the candidate is to say, he must suffer the consequences as a joint defamer. This is censorship and to us is no different from that present in *Sorensen* v. *Wood*, 123 Neb. 348 (1932), 243 N.W. 82, appeal dismissed, *sub. nom. KFAB Broadcasting Co.* v. *Sorensen*, 290 U.S. 599, wherein the court held that:

> "We are of the opinion that the prohibition of censorship of material broadcast over the radio station of a licensee merely prevents the licensee from censoring *the words as to their political and partisan trend* but does not give a licensee any privilege to join and assist in the publication of a libel nor grant any immunity from the consequences of such action."[21]

Hence, syllabus No. 2 then does not stand for any absolute prohibition against censorship but places upon the broadcaster the burden of determining what is and what is not germane to a political campaign.[22] If this be true, the syllabus, in effect, eviscerates the concept of complete prohibition of censorship inherent in Sec-

[21] We have previously pointed out that we think *Sorensen* to be irrelevant because it does not involve a candidate for office. Nevertheless, the parallel thinking of the two courts, if the syllabus be taken literally, is striking.

[22] Furthermore, in view of the interstate character of radio transmissions, this would require the broadcaster to be a legal expert not only in his own jurisdiction but in any state where his signal might be heard. For a recent and excellent article on Section 315, see Friedenthal and Medalie, *The Impact of Federal Regulation on Political Broadcasting: Section 315 of the Communications Act*, 72 Harv. L. Rev. 445 (January 1959).

tion 315. As we have indicated, we believe the prohibition to be absolute.

When we read the main body of the opinion, we note that the court below, without elaboration and without explanation, linked, in this order, the following principles of law: 1) absolute and qualified privilege, 2) its statement:

> "*There is no ambiguity in Section 315 supra.* It provides in clear and specific language that where candidates for political office are permitted to use the facilities of the station such station 'shall have no power of censorship.' " (Italics supplied.)

3) a quotation from this Court in *Beauharnais* v. *Illinois*, 343 U.S. 250, holding that there are certain exceptions and narrowly limited classes of speech the prevention of which had never been thought to raise any constitutional problem such as (p. 256) ". . . the lewd and obscene, the profane, and *libelous* . . ." (Italics supplied) and 4) its (the court below) final holding that "We cannot believe that it was the intent of Congress to compel a station to broadcast libelous statements and at the same time subject it to the risk of defending actions for damages." Thus, we have grave stirrings of doubt as to 1) what *constitutes* the decision and 2), considering the syllabus and the main decisional body together, whether the court construed the censorship portion of Section 315 to mean an absolute prohibition against prior restraint or whether that prohibition extends only to statements "germane" to the political issues involved.

We respectfully assert that implicit in "censorship," as used in Section 315, is a complete and absolute prohibition of any prior restraint by the licensee. It is

our judgment that *Near* v. *Minnesota*, 283 U.S. 697, should be, and is, the definitive principle applying to this particular aspect of the case at bar. There, this Court in a landmark decision, which has not been fundamentally watered down by subsequent decisions of this Court, stated (p. 718-720, incl.):

"The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals. The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provision of state constitutions.

"The importance of this immunity has not lessened. While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and prop-

erty by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. *The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.*" (Italics supplied.)

This is no more than a restatement of Madison's phrase "It is better to leave a few of the noxious branches to their luxurious growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits." [23]

We are not unaware of the fact that this Court has, in a few limited situations, upheld the constitutionality of state statutes designed to protect the public from statements ". . . utterly without redeeming social importance", *Roth* v. *United States*, 354 U.S. 476, 484. But even in these cases the statutes were directed not to prior restraint but rather the dissemination after publication.[24] Moreover, these cases are distinguishable from *Near* where the subject matter related to the misconduct of public officials. Historically, this was and still is, an area in which prior restraints must at all costs be avoided. In *Beauharnais* v. *Illinois*, *supra*, this Court stated (p. 263, footnote 18):

> "It deserves emphasis that there is no such attempt in this statute. The rubric 'race, color, creed or religion' which describes the type of group libel of which is punishable has attained too fixed

[23] 4 Madison's Works, Report on the Virginia Resolutions 544

[24] *Chaplinsky* v. *New Hampshire*, 315 U.S. 568; *Beauharnais* v. *Illinois*, 343 U.S. 250; *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436

> a meaning to permit political groups to be brought within it. If a statute sought to outlaw libels of political parties, quite different problems not now before us would be raised. For one thing, the whole doctrine of fair comment as indispensable to the democratic political process would come into play. See People v. Fuller, supra (258 Ill at 125, 87 NE 336); Commonwealth v. Pratt, 208 Mass 553, 559, 95 NE 165. Political parties, like public men, are, as it were, public property."

This philosophy, so basic to our form of government, was never so well expressed as it was by this Court when it stated in *Cantwell* v. *Connecticut*, 310 U.S. 296, 310:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

To make certain that the agency it created, the Federal Communications Commission, would not, under the guise of licensing powers, exercise any power of previous restraint, Congress enacted Section 326 of the Communications Act.[25] The purpose of this Section was to

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[25] Section 326 reads: "Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

eliminate the dangers of any possible censorship by governmental agency. In this connection, *Allen B. DuMont Laboratories* v. *Carroll*, 184 F.(2nd) 153 (C.A. 3 1950), cert. denied, 340 U.S. 929, is germane. There, the court struck down attempts by the State of Pennsylvania to censor films used by telecasters. The court, in defining censorship (p. 156) as "... the forbidding of publication, i.e., prohibition of publication in advance of publication" noted that Section 326 of the Communications Act explicitly forbade the Commission itself the power of censorship over the radio communications or signals transmitted by any radio station and stated (p. 156):

> "It is clear from the foregoing that Congress was concerned with the contents of the programs of all broadcasting stations including television transmitting stations, and provided exemplary penalties, including loss of license and penal sanctions for the transgressor who should broadcast an indecent or obscene program. *Congress did not intend to control in advance the broadcasting of radio programs but it did intend to prevent the transmittal of obscene matter through the ether.*" (Italics supplied).

In Section 315 we have the same awareness on the part of Congress, only this time it was concerned with the possible editing, or prior restraint as it were, on the part of station licensees in the field of political expression. We believe that no governmental body is more aware of the necessity of complete freedom of political discussion than the Congress of the United States, and we believe that the censorship probibitions enacted in both Section 326 and 315 have the same implications—no previous restraint before publication. Applicable

in this case is this Court's rationale in *Kovacs* v. *Cooper*, 336 U.S. 77, where at page 82 it was stated:

> "When ordinances undertake censorship of speech or religious practices *before permitting their exercise*, the Constitution forbids their enforcement." (Italics supplied)

At this time it perhaps might be in order to respectfully point out to this Court the practical limitations that are inherent in any attempt by a broadcast licensee to censor the remarks of a speaker utilizing his facilities. There would be nothing to prevent, for example, the extemporaneous deviation from a previously approved script. True, the broadcaster might cut the speaker off the air, but this could only be after the fact. The libel would already have been published. In this respect our medium differs considerably from the printed newspaper, for the editor has the physical power to delete any material which, in his judgment, he deems necessary. Accordingly, we do not believe that the reasoning of the court below (if such be its thinking), that a licensee may censor all but partisan sections of a speech, is realistic. It would place an almost intolerable burden upon the licensee and, as the court recognized in *Lamb* v. *Sutton*, 164 F.Supp. 928, 934 (D.C. Tenn. 1958):

> ". . . Would seriously impair the efficacy of the interdict against censorship and would introduce a distinction based upon the so-called partisan trend of the words which would be practically impossible to apply with any fair degree of certainty."

On this note, *Lamb* completely rejected *Sorensen*, *supra*, holding that the denial of the right of censorship is complete, including any portions of the material

deemed by the licensee to be defamatory. We subscribe to this view.

IV.

IF SECTION 315 OF THE COMMUNICATIONS ACT PROHIBITS CENSORSHIP BUT DOES NOT AFFORD IMMUNITY TO THE BROADCASTER, IT IS UNCONSTITUTIONAL AS A VIOLATION OF THE DUE PROCESS REQUIREMENTS OF THE CONSTITUTION.

We reach now the final phase of our argument, namely, that if Section 315 does not, concurrent with the prohibition of censorship, afford immunity, it is unconstitutional as being violative of the due process requirements of the Constitution. For while it is our expressed belief that political expression must be free of restraint, nevertheless this freedom must be achieved through constitutional means. No matter how desirable a given goal may be, even where the over-all public interest is concerned, the fundamental consideration is that the end must be solidly bottomed on observance of our system of law.

Nebbia v. *New York*, 291 U.S. 502, a case dealing with the regulation by a state sovereign of private rights, holds that the proposition we have asserted above is correct. While, in *Nebbia*, the Court recognized the power of the sovereign to regulate, it also, in the following words, delineated the boundary beyond which the sovereign must not step (p. 525):

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects State action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. *And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have*

a real and substantial relation to the object sought to be attained." (Italics supplied).

While *Nebbia* found the law in question to afford due process, we cannot believe that the complete contradiction implicit in prohibition of censorship *cum* no immunity can be held other than to be ". . . unreasonable, arbitrary or capricious." Moreover, to emmasculate Section 315 by denying immunity would result in the attribution to Congress, which was seeking freedom of political expression, of the absurd intent to pass legislation which had no ". . . real and substantial relation to the object sought to be attained."

Additionally, the power of the federal government to grant or withhold privileges, such as broadcast licenses, does not and cannot have inherent in it any power to bargain with a citizen for the surrender of his constitutional rights. In sum, even though the power of the sovereign to grant a privilege is admitted, constitutional rights which cannot be directly impinged upon may not be obliquely abrogated through imposition of an unconstitutional condition. Ever since *Home Insurance Co.* v. *Morse*, 20 Wall. 445, this has been settled. The rationale of the doctrine is thoroughly spelled out in *Frost* v. *Railroad Commissioners*, 271 U.S. 583. There, this Court held that a state could not require a private carrier to be converted, against its will, into a common carrier as a condition to use of the state highways. It was stated that (pp. 593-4):

> "There is involved in the inquiry not a single power, but two distinct powers. One of these—the power to prohibit the use of the public highways in proper cases—the state possesses; and the other—the power to compel a private carrier to assume against his will the duties and burdens of a common carrier—the state does not possess. It is clear

that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood, or to submit to a requirement which may constitute an intolerable burden.

"It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. *It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.*" (Italics supplied.)

Thus, *Nebbia, supra* and *Frost* indicate, without equivocation, that neither the federal nor state governments, even though theirs is the power to extend privileges, may do so if unconstitutional conditions are attached to the grant.

Finally, we respectfully submit that the injection into this particular area of political broadcasting of any theory of liability, *without control,* on the part of the licensee, would inject into the law an arbitrary and capricious philosophy. It may not be improper in some phases of commerce such as, for example, those involving dangerous occupations, to attach liability *without fault*—but where an individual is under compulsion of law to perform an act without control over the manner in which the act is performed, he is deprived of his constitutional right to due process if liability for that act accrues to him. We believe that *Munn* v. *Illinois*, 94 U.S. 113, recognized this principle. There the court noted (p. 126) that when one devotes his property to a use in which the public has an interest, he, in effect, grants an interest in that use and "must submit to be controlled by the public for the common good." Further the court pointed out that the individual might withdraw his grant by discontinuing the use but that ". . . so long as he maintains the use, he must submit to the control." That control, however, is (p. 134) subject to ". . . constitutional limitations."[26]

We believe, the general proposition we have set forth above was (by our own analogy) re-affirmed by this Court in its January 19, 1959, decision in *Local 24 of*

[26] See also *Mondou* v. *New York, New Haven and Hartford Railroad Co.*, 223 U.S. 1

the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. *Revel Oliver, et al.*, 27 U.S. Law Week 4077. There, this Court considered a state attempt to enjoin operation by unions, and carriers subject to the Interstate Commerce Act, under a collective bargaining agreement. The state court found the agreement to be in violation of local antitrust laws. Petitioners defended on the ground that the state could not lawfully exercise the power to apply its antitrust law to cause a forfeiture of (p. 4078) ". . ., federally sanctioned collective bargaining rights." This Court granted certiorari (p. 4079) ". . . to consider the important question raised of the interaction of state and federal power arising from the petitioner's claim that the Ohio regulation abridges rights protected by federal statute." Speaking through Mr. Justice Brennan, the Court reversed on grounds which we think highly pertinent to the case at bar.

In the first instance, the Court rejected the lower court's holding that the agreement in question was a remote and indirect approach to the subject of wages outside (p. 4080) ". . . the range of matters on *which the federal law requires the parties to bargain.*" (Italics supplied) Mr. Justice Brennan stated and answered the question to be decided, in this fashion (p. 4080):

> "We must decide whether Ohio's antitrust law may be applied to prevent the contracting parties from carrying out their agreement upon a subject matter *as to which federal law directs them to bargain.* Little extended discussion is necessary to show that Ohio law cannot be so applied. We need not concern ourselves today with a contractual provision dealing with a subject matter that the

parties were under no obligation to discuss; the carriers as employers were under a *duty* to bargain collectively with the union as to the subject matter of the Article, as we have shown." (Italics supplied)

The Court then stated that to allow application of the antitrust laws of Ohio (p. 4081) ". . . would wholly defeat the full realization of the Congressional purpose" and would frustrate the parties' solution of the problem which ". . . *Congress has required them to negotiate in good faith . . .*" Moreover, the Court noted "*Federal law here created the duty upon the parties to bargain collectively . . .*" (Italics supplied) Finally, the Court noted (p. 4081):

> "We have not here a case of a collective bargaining agreement in conflict with a local health or safety regulation; the conflict here is between the federally sanctioned agreement and state policy which seeks specifically to adjust relationships in the world of commerce. *If there is to be this sort of limitation on the arrangements that unions and employers may make with regard to these subjects,* pursuant to the collective bargaining provisions of the Wagner and Taft-Hartley Acts, *it is for Congress, not the States, to provide it.*" (Italics supplied)

Clearly, the broadcast licensee is in the same situation as were petitioners in *Local 24;* the licensee is here under the compulsion of federal mandate to air the speeches of duly qualified political candidates. Here, as in *Local 24,* if the states were allowed application of local libel and slander laws to these political utterances, there would also be complete defeat of the full realization of Congressional purpose. Moreover, as *Local 24* also noted, there is certainly nothing in the Communications Act to indicate Congressional intent to leave

the states with any power over political broadcasting. Reversal of the North Dakota decision, which is now before this Court, would, we respectfully assert, in reality, sanction conflict between federal and state policy in the "world of commerce", a course which this Court refused to permit in *Local 24*.

CONCLUSION

V.

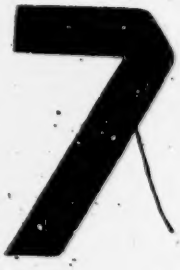
For the foregoing reasons, it is submitted that 1) the judgment of the court below should be affirmed if it stands for the proposition of complete prohibition of censorship and complete immunity to the licensee but that, 2) if it does not, it should be so modified as to provide for such complete prohibition and immunity. Conversely, 3) if Section 315 does not grant complete immunity to the broadcaster, it should be held unconstitutional as a violation of the due process clauses of the Constitution.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1958

FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA, NORTH DAKOTA DIVISION, A CORPORATION, PETITIONER,

v.

WDAY, INC., A CORPORATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

[redacted]

JOHN L. [redacted]
General Counsel,

[redacted]
Counsel,
Federal Communications Commission.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 248

FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA, NORTH DAKOTA DIVISION, A CORPORATION, PETITIONER

v.

WDAY, INC., A CORPORATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INTRODUCTION

This case presents two related questions involving the construction of Section 315 of the Communications Act of 1934, as amended (47 U. S. C., 315). That section, broadly speaking, provides legally qualified candidates for any public office with "equal opportunities" in the use of a broadcasting station's facilities. The first question is whether the statutory language prohibiting licensees from exercising any "power of censorship over the material broadcast under the provisions of this section" precludes a licensee from deleting material from a candidate's presentation on the ground that it is or may be defamatory. If so, there is the further question whether the federal prohibition against censorship affords the licensee, as distinguished from the candidate, immunity from

liability which might otherwise be imposed under state law. The Supreme Court of North Dakota has decided both of these questions in the affirmative. To similar effect, see *Lamb* v. *Sutton*, 164 F. Supp. 928 (M.D. Tenn.).

The answer to the first question has a most direct bearing on the Federal Communications Commission's day-to-day exercise of its regulatory responsibilities. If, as petitioner contends, broadcasting stations do have the power and the duty, notwithstanding Section 315, to excise, as defamatory, statements which political candidates propose to make (a conclusion which we dispute), it would necessarily follow that the Commission would be under a duty to keep a constant watch over the manner in which this power is exercised, *i.e.*, to determine whether the licensee is acting in good faith and in the public interest in making deletions from political broadcasts. If it should be held that there is some power of censorship in the licensee (although Congress has used unqualified words of prohibition), then the Commission could not escape the responsibility of policing the censor.

Further study of this case since the filing of our earlier memorandum at the petition stage leads us to believe that the Court may conclude that it need not, and probably should not, reach the second question at this stage of the instant litigation.

That question, at least in the abstract, has importance. Thus, if it were decided that the existing Act confers immunity from liability, the apparent tendency would be to stimulate broadcasters to adopt liberal policies from the standpoint of making time

available to political candidates—surely a matter of general interest to the public. If, on the other hand, the Court should determine that the federal Act, as it stands, does not preclude a state determination of the issue of liability, Congress would be thereby put on notice that it must legislate further if it should desire to give this added form of encouragement to political broadcasting.[1]

We find, however, as shown in a study only very recently published (Friedenthal and Medalie, *The Impact of Federal Regulation on Political Broadcasting: Section 315 of the Federal Communications Act*, 72 Harv. L. Rev. 445, 485 (January 1959)), that thirty-five states have given statutory protection to a broadcaster "when it has not wilfully been a party to the publication of defamation and has had no power to censor the material broadcast," and that "[e]ight other states grant some statutory protection such as the defense of due care." As the same authors point out (*ibid.*, at p. 486), even at common law "the provision against censorship has been generally held to give a qualified privilege under state law." Although it is true that state courts have imposed liability in situations where a defense based upon Section 315(a) was raised (see *Sorensen* v. *Wood*, 123 Nebr. 348; *Daniell* v. *Voice of New Hampshire*, 10 Pike & Fischer, R.R. 2045 (N.H. Super. Ct.)), those decisions rest upon the view that the licensee had the power to delete the offensive matter. We find no case involving Section 315(a) in which a court has held that the licensee was

[1] As to Congress's power to confer immunity, we see no room for doubt.

impotent to prevent the defamation but that it might nonetheless be held liable therefor.

There is a further factor. North Dakota—the state here involved—has an immunity statute which, were it given effect, would constitute a complete defense to the present suit. That statute was held violative of the North Dakota Constitution by the trial court (R. 12–13). The state immunity statute was not considered, however, by the Supreme Court of North Dakota because of respondent's failure to except to that holding in resisting petitioner's appeal (R. 35).[2] Nor does that court's opinion indicate whether, under the common law of North Dakota, liability would be imposed in circumstances where it appeared that the broadcasting station was required by federal law to permit the utterances challenged as libelous. Accordingly, if this Court should hold, as a matter of federal law, that a licensee has no power of censorship over material broadcast under Section 315(a), it would be uncertain whether North Dakota, as a matter of state law, would hold the licensee liable for any defamation so broadcast. In these circumstances, the Court might deem it appropriate to remand the case to the Supreme Court of North Dakota to afford that court a further opportunity to consider the unresolved questions of state law. Cf. *Barr* v. *Matteo,* 355 U.S. 171.

If this Court should adopt that view, we would nonetheless urge upon it the importance of deciding

[2] It does not appear that this failure would, as a matter of state law, deprive the Supreme Court of North Dakota of power to determine the issue. See North Dakota Rev. Code, 1943, Sec. 28-2728. Cf. *Wilson* v. *Kryger*, 29 N. Dak. 28, 149 N.W. 721; *Chaffee* v. *Edinger*, 29 N. Dak. 537, 151 N.W. 223; *Mevorah* v. *Goodman*, 65 N.W. 2d 278, 287.

the first question. Whether federal law precluded respondent from deleting the material which provides the basis of petitioner's claim of injury might well be crucial to a determination by the Supreme Court of North Dakota of the outstanding questions of state law: (1) Whether the state immunity statute is constitutional (under the state Constitution) as it would here apply; (2) whether, apart from that statute, North Dakota, in these circumstances, would impose liability under its common law of torts. We would emphasize that the vexing question in state court proceedings has been the question whether the federal ban on censorship is absolute or whether it contains an implied exception authorizing deletion of defamatory matter.

The argument which follows is devoted to the first question presented by this case—the question which we believe to be of primary and focal importance.[3]

[3] We note that the immunity-from-liability question, should the Court reach it, is briefed at length by the private parties immediately concerned and by the National Association of Broadcasters. The alternatives on that issue would appear to be threefold: (1) The Court may conclude that the language of Section 315, itself, necessarily implies immunity because Congress could not have intended to make the licensee liable for acts which Congress, in the exercise of its regulatory powers, made mandatory; (2) it may be concluded that Congress, uncertain as to the course it should take on liability, decided to leave it to the states to determine in what circumstances (if any) they would impose liability; or (3) it may be decided that Congress has left it to the federal courts, applying the doctrines of preemption, to determine when the remedy which a state proposes to give constitutes a substantial interference with the "accomplishment and execution of the full purposes and objectives" (*Hines* v. *Davidowitz*, 312 U.S. 52, 67) of the federal Act.

SECTION 315 DOES NOT AUTHORIZE A BROADCAST STATION LICENSEE TO DELETE, AS DEFAMATORY, ANY PART OF THE MATERIAL BROADCAST UNDER ITS PROVISIONS

Section 315(a) of the Communications Act (47 U.S.C. 315(a)) provides:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.

The basic facts of the present case are not in dispute. A. C. Townley was a legally qualified candidate for United States Senator at the time he broadcast, over the facilities of Station WDAY, the speech which is the gravamen of petitioner's complaint. WDAY, having extended its facilities to other candidates for the same office, was required to afford him "equal opportunities * * * in the use of such broadcasting station." It did so only after it had objected to the script and had advised Mr. Townley that it would not permit the broadcast unless demand were made under Section 315. The sole issue with respect to WDAY's power, therefore, is whether it could refuse to broadcast the portions of Mr. Townley's script it believed to be defamatory in the face of the statute's admonition that "such licensee shall have

no power of censorship over the material broadcast under the provisions of this section."

We examine this issue from three standpoints: the provisions of the Communications Act; the relevant legislative history; the course of administrative interpretation.

A. The provisions of the Communications Act

Section 315(a), as noted above, is unequivocal in its command—"such licensee shall have no power of censorship * * *" The concept of censorship can hardly be deemed a doubtful one, whether one looks to common understanding or to judicial opinion. The essence of censorship is examination of material in advance of publication in order to prevent publication in those instances where the censor deems the material objectionable. A censor, in dictionary terms, is "an official empowered to examine written or printed matter * * * in order to forbid publication, circulation, or representation if it contains anything objectionable." Webster, *New International Dictionary*, 2d Ed., unabridged, 1958. The vice of censorship, as this Court has had repeated occasion to point out, is that it involves the exercise of "previous restraints" upon publication. See, *e.g.*, *Near* v. *Minnesota*, 283 U.S. 697, 712–723; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503–504. On the face of it, therefore, Section 315(a) means that the licensee is to have no power whatever to make a binding determination as to what the political candidate may or may not say.

Petitioner seeks to escape this conclusion by suggesting that the licensee should be able to suppress an "illegal" statement; "deletion of libel," it is said, "is not censorship" (Pet. Br., p. 14). This is in substance the ancient argument of the censor—that he is protecting the interests of society because he only deletes what is illegal, immoral, untrue, or otherwise plainly objectionable. As John Stuart Mill said in answer to this kind of argument (*On Liberty,* Britannica Ed., 1952, p. 277):

> Strange it is, that men should admit the validity of the arguments for free discussion, but object to their being "pushed to an extreme"; not seeing that unless the reasons are good for an extreme case, they are not good for any case. Strange that they should imagine that they are not assuming infallibility, when they acknowledge that there should be free discussion on all subjects which can possibly be *doubtful,* but think that some particular principle or doctrine should be forbidden to be questioned because it is so *certain,* that is, because *they are certain* that it is certain.

The basic objection to censorship is that it puts the censor—in this case, it would be a private person—in the position of determining in advance, by the formation of an *ex parte* judgment, what should be allowed and what should be suppressed. The licensee would have to draw a line between the permissible and the impermissible, and decide on which side of the line the proffered matter falls. Even were the line between defamation and non-defamation as clear and precise as petitioner seems to think, Congress

has decided, as to matters encompassed by Section 315(a), that licensees shall not exercise a power so at variance with American traditions and attitudes regarding political debates.

But it is by no means a simple or automatic process to determine when a statement may run afoul of the law of libel. As long experience has demonstrated, questions of libel and defamation are among the most treacherous known to the law. It would be a strange construction indeed which would result in the conclusion that Congress, when it declared the rule of "no censorship," meant to remove the function of determining those questions of law and fact from judges and juries and to confer it upon station owners. To cite the most obvious of the many difficulties which petitioner's theory encounters, what of the defense of truth? What of the statement which subjects the speaker to potential liability if it be false, but not if it be true? Is the licensee to make a full investigation of the truth or falsity of the statement and evaluate all of the relevant evidence? And what of the scope of the broad privilege of reply in political controversies? If it is the licensee's duty at its peril to make the judgment whether the material is or is not defamatory as a matter of law and fact, there can be little doubt as to the manner in which that duty will ordinarily be performed. The licensee, in order to protect itself, will be impelled to censor all speech which might conceivably be defamatory and to insist that no charge, even though it may appear to be well-founded and made in utmost good faith, be broadcast if it might conceivably prove false.

It is evident, therefore, that the exception which petitioner would read into the "no censorship" clause—an exception giving the broadcaster power to censor material which is or may be defamatory—is neither minimal nor unimportant. Charges involving the conduct or character of other candidates or their political associates are the rule, rather than the exception, in election campaigns—a circumstance of which Congress was assuredly aware. Such charges, if based on fact, constitute information of vital interest and concern to members of the voting public, albeit such charges, if false, may constitute or border upon defamation. This Court has observed that liberty of the press has been "especially cherished" in our history "for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct." *Near* v. *Minnesota, supra,* 283 U.S. at 717. Congress has similarly supported the candidate's immunity from previous restraint.

Petitioner seeks to draw comfort from the fact that a more persuasive argument in favor of broadcaster control might be made out in the situation where the candidate proposes to use obscene language or to call upon his listeners to commit a criminal act. Whatever the arguments (and we are not here endorsing them) for implying an exception in those situations, they provide scant aid in resolving the issue which is now before the Court. It might be argued, for example, that a broadcaster's act in barring the use of obscene language is consistent with the underlying purpose of Section 315(a) because

that section is designed simply to insure the free dissemination of information. The same argument cannot be made in favor of a power to censor material which the licensee considers to be actually or potentially defamatory. As we have emphasized, whether a statement which seems actionable will ultimately prove so depends upon many factors, among them, whether it turns out to be true or false. If the charge is true, it may well be germane to political issues. Indeed, it may be of the highest importance that the electorate should hear it. It is thus one thing to suggest that the broadcaster should be free to delete a foul expletive;[4] it is quite another to say that the licensee should be placed in the position where it is called upon, for example, to pass upon a candidate's accusation that the candidate's political opponents (or other members of the political opposition) have engaged in misconduct.[5]

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[4] It does not appear that the question of "censorship" in this area is, as a practical matter, a significant problem.

[5] In the case of *Port Huron Broadcasting Co.*, 12 F.C.C. 1063, 1074, the Commission stated its view that Section 315 precludes acts of censorship based on the allegedly libelous content of the speech, but left open the question whether the section forbids deletion of statements which violate federal law, declaring:

> Accordingly, we are of the opinion that the prohibition of section 315 against any censorship by licensees of political speeches by candidates for office is absolute, and no exception exists in the case of material which is either libelous or might tend to involve the station in an action for damages. In reaching this conclusion, however, we hold merely that the censorship prohibited under section 315 of the Communications Act includes the refusal to broadcast a speech or part of a speech by a candidate for public office because of the allegedly libelous or slan-

Petitioner argues that Section 315(a) does not impose upon the licensee an obligation to allow the candidates for a particular office to use the station facilities at all; that, therefore, the licensee has an effective means of controlling the contents of a proposed speech when the candidate involved is the first candidate to seek broadcast time; and that if the candidates who later speak in reply are not prevented by the licensee from uttering defamatory statements, they will thereby gain an unfair advantage over the first speaker.

The argument proves too much. If the licensee could exercise complete control over the first candidate's speech, there could never be equalization of treatment unless the licensee were to exercise the same degree of control over subsequent speeches by other

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derous content of the speech. Nothing in this opinion is intended to indicate that a licensee is necessarily without power to prevent the broadcast of statements or utterances in violation of the provisions of the Communications Act or any other Federal law on broadcasts coming within the requirements of section 315 of the Communications Act.

Doubtless, the broadcaster may remonstrate with the candidate or notify the proper authorities if it appears that the candidate proposes to use the facilities to commit a criminal act. For these reasons, the Commission has concluded that the broadcaster may require a script in advance, so long as the requirement is not used as a means of imposing censorship and is applied equally to all candidates. See *Use of Broadcast Facilities by Candidates for Public Office*, (Public Notice) 23 F.R. 7817, 7820 (1958); cf. Hearings before the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration, 82d Cong., 1st & 2d Sess., on Proposed Amendments to the Federal Corrupt Practices Act and the Hatch Political Activities Act, p. 119 (1952).

candidates. If that were done, Section 315(a)'s prohibition of censorship would become utterly meaningless. In our view of the statute, Section 315 seeks to insure that all candidates shall have equal access to the broadcast audience and that all shall be free of prior restraint upon the contents of their speech. We believe that the Commission has correctly construed the prohibition of censorship of "* * * material broadcast under the provisions of this section" to extend to broadcasts by all candidates for a particular office, including the first to use a station. *Port Huron Broadcasting Co.*, 12 F.C.C. 1069, 1070–1071. *Accord: Lamb* v. *Sutton*, 164 F. Supp. 928, 935–6 (M.D. Tenn.); but see *Weiss* v. *Los Angeles Broadcasting Corp.*, 163 F. 2d 313 (C.A. 9) (alternative holding), certiorari denied, 333 U.S. 876; *Daniell* v. *Voice of New Hampshire*, 10 Pike & Fischer, R. R. 2045 (N.H. Super. Ct.) (alternative holding).

Petitioner also seeks to build an argument upon Section 326 of the Communications Act (47 U.S.C. 326), which reads:

> Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

It has been held that this section does not bar the Commission from considering past programming performance (including past use of broadcasting facilities to disseminate defamatory matter) in deciding

whether to grant a renewal of license. *Trinity Methodist Church, South* v. *Federal Radio Commission*, 62 F. 2d 850 (C.A.D.C.), certiorari denied, 284 U.S. 685, 288 U.S. 599; *KFKB Broadcasting Association* v. *Federal Radio Commission*, 47 F. 2d 670 (C.A.D.C.); cf. *Independent Broadcasting Co.* v. *Federal Communications Commission*, 193 F. 2d 900 (C.A.D.C.). Petitioner reasons (Br., pp. 23–24) that the Commission is not barred in this respect because Section 326's denial of the power of censorship means only that there shall be no interference with constitutionally protected speech. It argues that the same meaning is to be given the "no censorship" provision in Section 315(a).

The short answer is that the Commission may consider past performance in deciding whether a renewal is in the public interest because consideration of past broadcasting activities is not censorship at all. The broadcaster's freedom from Commission censorship, guaranteed by Section 326, no more implies that the station shall not answer for the consequences of abuse than do the constitutional guarantees of freedom of speech and press imply that a speaker or publisher shall be immune from suit for slander or libel. As observed in the *KFKB* case, *supra*, 47 F. 2d at 672:

> * * * There has been no attempt on the part of the commission to subject any part of appellant's broadcasting matter to scrutiny prior to its release. In considering the question whether the public interest, convenience, or necessity will be served by a renewal of ap-

> pellant's license, the commission has merely exercised its undoubted right to take note of appellant's past conduct, which is not censorship.

Such consideration is "neither censorship nor previous restraint, nor * * * whittling away of the rights guaranteed by the First Amendment, or an impairment of their free exercise." *Trinity Methodist Church* case, *supra*, 62 F. 2d at 853.

In short, we are brought back to the fundamental proposition that the essence of censorship is the imposition of a previous restraint and that it is that which Congress has forbidden both in Section 326 and in Section 315(a).

B. Legislative history

The relevant portions of Section 315 derive, without significant change, from Section 18 of the Radio Act of 1927, 44 Stat. 1162. In enacting the 1927 statute, "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137. Congress feared, of course, the ordinary evils of monopoly, but more particularly it was concerned with the power over the minds of men inherent in any concentration of control over the broadcasting medium.

A strong element in the House, led by Congressman Davis of Tennessee, was especially concerned by the licensee's power to control the material to be broadcast (which Mr. Davis and others called "pri-

vate censorship") and by the inherent possibilities for discrimination as between various political, social and other interests in the community. See, *e.g.*, H. Rep. No. 464, 69th Cong., 1st Sess., pp. 15–17; 67 Cong. Rec. 5483, 5491, 5558–9; Hearings before the House Committee on the Merchant Marine and Fisheries, 69th Cong., 1st Sess., on H.R. 5589, pp. 56–8, 83–4. The House adopted an amendment to the bill proposed by Congressman Johnson of Texas, with the object of precluding just such discrimination. This amendment would have authorized revocation of a license upon certification by the Interstate Commerce Commission that the licensee had discriminated as to charges or as to service. 67 Cong. Rec. 5558, 5560.

The Senate Committee, before which the questions of "private censorship" and discrimination by the licensee had been repeatedly raised,* reported the following provision (H. R. 9971, 69th Cong., 1st Sess., as reported to the full Senate, May 6, 1926, p. 50, Section 4; 67 Con. Rec. 12503):

> If any licensee shall permit a broadcasting station to be used * * * [to broadcast matter for a valuable consideration], or by a candidate or candidates for public office, or for the discussion of any question affecting the public, he shall make no discrimination as to the use of such broadcasting station, and with respect to said matters the licensee shall be deemed a common carrier in interstate commerce: *Provided*, That such licensee shall have no power to censor the material broadcast.

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* See Hearings before the Senate Committee on Interstate Commerce, 69th Cong., 1st Sess., on S. 1 and S. 1754, pp. 97–8, 125–34, 189, 205–6, 228, 257–8.

A majority of the Committee reconsidered the matter after reporting out this provision and proposed an amendment to it on the floor of the Senate. The primary objections, as Senator Dill, the bill's floor manager, indicated, were to the "common carrier" provision and to the breadth of the language "discussion of any question affecting the public." 67 Cong. Rec. 12501–3, 12504. The committee amendment was adopted, and as the bill passed the Senate the provision read (67 Cong. Rec. 12502, 12505):

> If any licensee shall permit a broadcasting station to be used by a candidate or candidates for any public office, he shall afford equal opportunities to all candidates for such public office in the use of such broadcasting station: *Provided,* That such licensee shall have no power to censor the material broadcast under the provisions of this paragraph and shall not be liable to criminal or civil action by reason of any uncensored utterances thus broadcast.

Senator Fess, a committee member, remarked: "One of the difficulties that we have met all along in our consideration was as how to avoid censoring and at the same time how to defend the broadcasting station from liability for damages." 67 Cong. Rec. 12503. Referring to the committee amendment's proviso on licensee censorship, he asked Senator Dill, "Is it possible for us to write into law entire exemption from liability in a case that might go to court?" *Ibid.* Senator Dill replied:

> I think so. I do not see why we have not that power. Perhaps I am wrong in that.

> However, I may say to the Senator that the broadcasting station owners take the position that if they are not to censor such material they must not be held liable.

If the bill had been enacted in this form, there could be no doubt that the prohibition of licensee censorship encompassed the deletion of potentially defamatory matter. The only conceivable ground for contending that Congress intended to permit licensee deletion of defamatory material is the action of the Conference Committee, which struck the provision granting the licensee civil and criminal immunity for the broadcast of "uncensored utterances." H. Rep. No. 1886, 69th Cong., 2d Sess., pp. 10, 18. This action was not explained in the conference report or on the floor of either house. The only available indications are provided by Senator Fess's question, prior to the conference, as to the power of Congress to destroy liability which might otherwise be imposed and by the fate of another provision of the Senate bill. This latter provision, which made criminally punishable the knowing utterance of "any slanderous or libelous communication by radio," was dropped without comment by the Conference Committee. Explaining the action of the Conference Committee, the floor manager for the conference bill in the House stated (68 Cong. Rec. 2567):

> When we reached conference the question presented itself as to the legality of such a provision. I do not refer to the legality of the right of Congress to put it in, but as to where the right of action would attach.

This much may be said. Although Congress decided not to legislate explicitly on the subject of immunity from liability (perhaps, owing to uncertainties over the situs and forum of the "right of action," perhaps because of doubts as to its powers or because of other unexpressed doubts),[1] Congress did consistently and deliberately adhere to the view that it was not going to permit censorship of the speeches of political candidates.

In the five years following passage of the 1927 Act, there is no evidence of legislative concern with the problem. It was not until after the Supreme Court of Nebraska stated, in *Sorensen* v. *Wood*, 123 Neb. 348, 243 N.W. 82 (1932), that a broadcast licensee remained liable for defamatory remarks made by candidates because the Radio Act's prohibition of censorship related only to the "political and partisan trend" of the words used that Congressional attention was again directed to this provision.[2]

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[1] It must be remembered that in 1927 the law of radio defamation was non-existent. Solicitor Davis of the Commerce Department, who was the chief representative of the executive branch in the hearings which led to the adoption of the Radio Act of 1927, wrote, "The very bases of liability are in doubt." Davis, *The Law of Radio Communication* (1927), p. 174. Congress may well have concluded that there was no need of an immediate decision on the issue of liability, reasoning that no state would impose liability on the licensee in the face of a prohibition of censorship.

[2] Following the Nebraska Supreme Court's decision, the *Sorensen* case was remanded for a new trial and the broadcaster was held liable. The judgment was ultimately appealed to this Court, which dismissed the appeal because the judgment was supported by an adequate non-federal ground of decision. *KFAB Broadcast-*

In hearings upon a 1932 bill which included a number of proposed amendments to the Act, a broadcast industry representative drew attention to the *Sorenson* decision and suggested that, although the industry was prepared to accept responsibility for candidates' remarks, in that event "we must have the right to go over speeches in advance and see what is in them, for we cannot wait until they are on the air." Hearings before the Senate Committee on Interstate Commerce, 72d Cong., 2d Sess. on H.R. 7716, Part 2, p. 9. The ensuing discussion (*id.*, at pp. 9–12) covered both this proposal and that of Senator Dill, who suggested the possibility of an explicit grant of immunity to the licensee. However, no action was taken by the Senate committee or by either house.

In hearings on the bills which became the Communications Act of 1934, the broadcast industry representative once again called attention to the *Sorenson* case. Hearings before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. on S. 2910, pp. 63–4, 66–7. He suggested that the new Communications Commission to be created by the proposed legislation study the matter and report to Congress. When asked for his own solution to the problem, he replied (*id.*, at p. 64):

> I would leave section 18 as it is, with a proviso that any broadcaster may, or has the right to, see in advance any speech submitted

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ing Co. v. *Sorensen*, 290 U.S. 599. That ground, the records of this Court reveal, was that the cause had become moot as a result of the broadcasting company's satisfaction of the judgment.

> for broadcasting, to determine whether that speech contains material which is libelous or slanderous, and to bar such speech or such section of the speech from the air, if it is contrary to the laws of the State.

No action was taken on this suggestion by the committee or by either house of Congress, and the Radio Act provision was reenacted without change. The only inference to be drawn, we believe, is that the meaning of the provision was not changed and that the prohibition of licensee censorship remained absolute.[9]

C. Administrative interpretation

To our knowledge, the Federal Radio Commission had no occasion, during its administration of the Radio Act of 1927, to express its views as to the proper construction of the "no censorship" clause in Section 18 (later Section 315(a)).

The first expression from the Federal Communications Commission was in 1943, when the Chairman

[9] Strictly speaking, this completes the legislative history of Section 315(a) and its predecessor. It should be noted, however, that while Congress has had before it, and has failed to act upon, a number of proposals which would have explicitly granted the licensee immunity from liability for "uncensored utterances" broadcast under the compulsion of Section 315 (a point emphasized by petitioner (Br., pp. 27–30)), it has also had before it, and has failed to act upon, a number of proposals which would have granted the broadcast licensee explicit authority to delete defamatory matter. See S. 814, 78th Cong., 1st Sess.; H.R. 7782, 82d Cong., 2d Sess.; H.R. 539, 83d Cong., 1st Sess.; see also Hearings before the Senate Committee on Interstate Commerce, 78th Cong., 1st Sess. on S. 814, pp. 63–5, 162, 945, 950–1. Moreover, in considering major amendments of the Communications Act in 1952, the House specifically rejected such a proposal. See 98 Cong. Rec. 7401–2, 7403–4, 7412–5.

as a reason for not administering the law as we read it. Nor will we accept the argument that state statutes or common law on the subject of libel in some way supplant or modify the unqualified pronouncement of Congress on the use of the interstate facilities of radio by candidates in making political broadcasts.

Since 1951, the Commission has adhered to this position. See *Use of Broadcast Facilities by Candidates for Public Office* (Public Notice) 19 F.R. 5948, 5951 (1954); *Use of Broadcast Facilities by Candidates for Public Office* (Public Notice) 23 F.R. 7817, 7820 (1958). Despite major amendment of the Communications Act in 1952 (66 Stat. 711), no change in this provision of Section 315 has been made by the Congress. Indeed, as noted above (p. 21, note 9), the House, in considering the 1952 amendments, specifically rejected a proposal which would have limited Section 315's prohibition of censorship to "political or partisan" matters and would have permitted the licensee to delete defamatory material. 98 Cong. Rec. 7415.

CONCLUSION

In our view, the statutory provision involved, Section 315(a), and all relevant aids to its construction require the holding that a broadcast licensee may not delete material from the speeches of political candidates on the ground that such material is or may be defamatory. In the light of such a holding, further questions should be resolved, probably pursuant to a remand.

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testified in opposition to a bill which would have granted the station licensee the power to delete defamatory material. Hearings before the Senate Committee on Interstate Commerce, 78th Cong., 1st Sess. on S. 814, pp. 63–65. The Commission's comments on this provision, which were inserted in the committee hearing record, treated the then existing prohibition of licensee censorship as permitting no exception for defamatory or other offensive material. Thus, it was stated: "It is believed that it would probably be more desirable to *retain the prohibition against censorship* and absolve the licensee of responsibility * * *" (*id.*, at p. 945). (Emphasis added.)

In 1948, in the case of *Port Huron Broadcasting Co.*, 12 F.C.C. 1069, a license renewal proceeding, the Commission considered the applicant's past conduct in cancelling certain broadcasts by political candidates. It held that Section 315(a) withdraws from the licensee any power to delete part or all of a candidate's proposed speech on the ground that it is or may be held to be defamatory. Concluding, however, that the applicant's violation of the provision had not been deliberate, the Commission permitted renewal of the license. The *Port Huron* opinion also expresses the view that federal law would protect a licensee from liability in the situation where a defamatory speech is broadcast under the compulsion of Section 315(a).

Subsequent to the *Port Huron* decision, a federal three-judge district court, though holding that the Commission's interpretation of Section 315(a) did not constitute an order reviewable at the instance

of a broadcaster not involved in the *Port Huron* proceeding, criticized the views there expressed. *Houston Post Co.* v. *United States*, 79 F. Supp. 199 (S.D. Texas). A Select Committee of the House of Representatives, which investigated various phases of radio regulation, likewise criticized the *Port Huron* decision. See H. Rep. No. 2461, 80th Cong., 2d Sess. The Committee was assured by the Commission that, pending an opportunity for Congress to consider additional legislation directed to the problems created by Section 315(a), no licensee who deleted clearly defamatory material from a candidate's broadcast would be in jeopardy of losing his license. Hearings before the Select Committee to Investigate the Federal Communications Commission, 80th Cong., 2d Sess., pursuant to H. Res. 691, pp. 108-9 (1948).

In the two subsequent sessions of Congress, however, no legislation on this subject was enacted, and in November 1951 the Commission affirmed its interpretation of Section 315 as barring the deletion by the licensee of potentially defamatory matter. The Commission ruled (*WDSU Broadcasting Corp.*, 7 Pike & Fischer, R.R. 769, 773):

> We have stated what we believe to be the proper interpretation of § 315 in the Port Huron decision. No statute supplanting the existing law and our interpretation of it has been enacted by Congress. We, therefore, think there is no longer any reason to defer application of what we believe § 315 to require in any case of censorship of political broadcasts, and hereafter we will not accept the plea of doubt and uncertainty in the state of the law.

8

IN THE

Supreme Court of the United States

October Term, 1958

No. 248

FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA, NORTH DAKOTA DIVISION, a Corporation,

Petitioner,

v.

WDAY, INC., a Corporation,

On Writ of Certiorari to the Supreme Court of North Dakota

PETITIONER'S REPLY BRIEF

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WDAY, INC., a Corporation.

On Writ of Certiorari to the Supreme Court of North Dakota

PETITIONER'S REPLY BRIEF

We shall attempt to answer briefly the points made in the brief for respondent WDAY, Inc. and the briefs of *amici curiae*. None of them seems entirely satisfied with the decision below. All of them argue the case as if petitioner were an opposing candidate. They ignore the important and distinguishing fact that the petitioner is a third person, not a candidate for public office.

I. The position taken by respondent

The respondent takes the frank position that it "regrets that its facilities have been used and, under the law, may well be used again as an instrument of defamation" (Resp. Br. p. 18) but it pleads that under "the mandate of the licensing agency" it had to permit the broadcast complained of (*Id.* p. 3). It calls attention to the fact that Townley, the candidate who libelled petitioner, received only 937 of the 244,161 votes cast (*Id.* p. 18) and was called a "political non-entity" (*Id.* p. 14) by "a trade publication regarded by many as the spokesman for the industry," i.e., Broadcasting magazine (*Id.* p. 13).

Respondent freely admits that it had "every opportunity for editorial excision, either completely or partially, that there is in the usual publication of a paid advertisement in a newspaper" (*Id.* p. 3). When the broadcast was given, Townley, the speaker, was not present and the film of his speech, which was broadcast, had been previously prepared by the respondent (*Ibid.*).

Although respondent calls for affirmance of the decision below, it also appears to agree with Broadcasting magazine that "The North Dakota court's interpretation should not be allowed to stand" if broadcasters are to achieve "journalistic maturity" (*Id.* p. 14).

Respondent argues that under the mandate of Section 315, it was compelled to broadcast the Townley speech and was "deprived of the right of exercising editorial discretion in connection with it" (*Id.* p. 13). Consequently, respondent urges, it was only a "disseminator" and not a "publisher" of the defamatory material and under the rules applicable to the "disseminators" of such material, it cannot be held liable therefor. This argument in effect concedes the invalidity of respondent's claim that Section 315 supersedes the state libel law. If the question of re-

spondent's liability as a "disseminator" arises at all, it does so only in the context of state libel law which we maintain applies herein but which respondent says has been abrogated by Section 315.

II. The position taken by the *amici curiae*

The various *amici* are not in complete agreement with respondent, with each other or with the court below.

The Government, on behalf of the Federal Communications Commission, the licensing agency, contends that Section 315 requires a holding that the licensee may not delete defamatory matter (Govt. Br. p. 25), although it recognizes the possibility that other unlawful matter may be deleted notwithstanding the no "censorship" provision of that section. (Govt. Br. pp. 10-12). But it admits that such a holding would render the licensee "powerless to prevent the very widespread dissemination of objectionable defamatory statements which might significantly affect the outcome of a particular election" (Govt. Memo for Cert. p. 3). The Government also suggests that the case should be remanded for clarification of the North Dakota law as to immunity (Gov't Br., pp. 4 and 5).

The National Association of Broadcasters, as *amicus*, vigorously criticizes the opinion of the North Dakota court as possibly introducing a standard of "germaneness" in violation of the no "censorship" provision of Section 315 (N.A.B. Br. 47-50). It urges that (1) the judgment below be affirmed only if it stands for complete prohibition of deletion of any matter at all in a political broadcast, no matter how illegal; and that (2) unless immunity follows, then (3) Section 315 should be declared unconstitutional as a deprivation of due process.

The American Civil Liberties Union in its *amicus* brief admits that the defamatory charges against the petitioner were false (A.C.L.U. Br. p. 6) but claims that the petitioner is not remediless because it can prosecute the speaker for criminal libel (*id.* p. 12). It urges that the decision below should be affirmed (*id.* p. 15).

III. Answering opposing arguments

A. The argument that no "censorship" precludes deletion of libel

> "Prohibitions against censorship whether of a constitutional or statutory nature do not forbid the control of language which is beyond the guarantees of free speech."

The National Association of Broadcasters thus succinctly construed the no "censorship" provision of Section 315 in a brief submitted to the Federal Communications Commission and the Special Committee of Congress in 1948. (Hearings pursuant to H. Res. 691, 80th Congress, 2d Sess., p. 52 *et seq.*) At that time it urged that Congress "did not completely and absolutely bar licensees from exercising any power of censorship in this regard and * * * did not intend to wipe out state laws affording civil and criminal remedies as against licensees who publish political broadcasts containing defamatory matter" (*id.* at p. 57). This contrasts strangely with the position which it now takes. The National Association of Broadcasters now argues that the no "censorship" provision forbids licensees to delete libel because such deletion is a "prior" or "previous" restraint. But, as the Government points out in its *amicus* brief, a censor is "an *official* empowered to examine written or printed matter" (Gov't Br., p. 7) (italics ours). Of course, a licensee is not "an official." If

deletion of libel is "censorship" then our newspapers, our magazines and our book publishing houses are "censoring" bodies. This clearly is not so. Nor are broadcasting stations "censoring" when they delete libel and other illegal matter from the programs which they broadcast. This they are under an obligation to do, and failure to comply with that obligation may result in the drastic penalty of loss of license. The Commission and the court below now characterize as "censorship" not to be tolerated under Section 315 this duty of deletion which is in all other contexts enjoined upon the broadcasters.

Amicus American Civil Liberties Union agrees with us that when the Commission declines to renew a broadcast license because the licensee has been guilty of defamation, this is not "censorship" in violation of Section 326. It attempts to distinguish this situation, however, from deletion of libel in a Section 315 case on the ground that under Section 326 the Commission acts "after a speech has been made." (A.C.L.U. Br. p. 11) This attempted distinction ignores completely the fact that denial of all future use of the airwaves on grounds of defamation is the most complete form of "prior restraint" there can be. Yet this is a necessary and proper restraint which the Commission imposes in the public interest without being guilty of "censorship" where a station has not fulfilled its obligation to delete defamation.

"This is neither censorship nor prior restraint" said the court in upholding the Commission's right to take such action. (*Trinity Methodist Church* v. *Federal Radio Commission*, 62 Fed. (2d) 850, 853 (App. D. C., 1933).) And this Court has said:

> "There are certain well defined and narrowly limited classes of speech, *the prevention* and punishment of which have never been thought to raise any constitutional problem. These include the * * * libel-

ous • • • 'personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution.' " *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571 (1942) [italics ours].

This is not a case in which a governmental agency seeks to restrain speech. Quite the contrary, this is a situation in which it is claimed that the federal government *requires* a private instrumentality to publish defamation violative of state law. It has never been deemed "censorship" for a private medium of communication to excise defamation. "Censorship" when applied to the actions of private persons, means interference with the substance of speech, not deletion of libel or other unlawful matter. It is that kind of interference that Section 315 forbids, as was held by the Nebraska Supreme Court in *Sorensen* v. *Wood*, 123 Neb. 348, 243 N. W. 82 (1932).

The reliance on *Near* v. *Minnesota*, 283 U.S. 697 (1931) and other cases which forbid *governmental* prior restraint of publications confuses the issue. *Near* in no way involved disapproval of the ordinary steps taken by a private publisher to comply with the law of libel, law which Mr. Chief Justice Hughes emphasized in that case "is essential to the protection of the public" (*id.* at 715). On the contrary, in *Near*, the state by statute purported to forbid the defendant from publishing future editions of his own newspaper. We are not of course here urging that a candidate should be barred from the airwaves because his speech contains defamation. It is our contention only that Section 315 gives him no right to use the facilities of a broadcaster for the extraordinary purpose of broadcasting concededly libelous matter about a non-candidate.[1]

[1] The Maryland statute governing "Broadcasters' liability for statements by candidates for public office" immunizes the station where plaintiff is an opposing candidate, but permits recovery of "compensatory damages" where plaintiff is a non-candidate. Md. Annot. Code, Art. 75, §6 (1952).

It is a necessary corollary from the decision of the court below and the position taken by respondent and the *amici curiae* that if, for example, Mr. Beauharnais had been running for office in Illinois, had been entitled to "equal opportunities" under Section 315 and had included in his speech as a political candidate the material on the basis of which he was convicted of criminal libel, the station would have been compelled to broadcast the very words which this court held constitutionally warranted his going to jail. *Beauharnais* v. *Illinois*, 343 U. S. 250 (1952). It is a further necessary corollary from the opposing arguments that the station would have been immune from all state liability in these circumstances. Or suppose a licensee were presented with a speech of a political candidate which, in its opinion (and in the words of this Court), creates a "clear and present danger of riot, disorder, interference with traffic upon the public streets or other immediate threat to public safety, peace or order." This Court has said that in such circumstances "the power of the *state* to prevent * * *" is obvious. *Cantwell* v. *Connecticut*, 310 U. S. 296-308 (1940). (italics ours) Yet under the ruling below, the station is said to be obliged to broadcast the speech and, again, to be immune from all state action because of the broadcast. Such a view clearly subverts the police power of the state, the "public interest" purpose of the Federal Communications Act and the decisions of this Court.

B. The alleged "legislative acquiescence" in the "administrative interpretation" of Section 315

It is argued that the construction of the no "censorship" provision of Section 315 adopted by the Court below must be adhered to because it is based on "consistent" administrative interpretation, in which there has been congressional "acquiescence" (N.A.B. Br., p. 29).

But the National Association of Broadcasters, in its 1948 brief (*supra*, p. 4) urged that the legislative history demonstrated congressional *rejection* of the position taken by the Commission.

It pointed out that immunity legislation was specifically rejected in 1927 (*id.* at 57-8) and that, when the provision was reenacted without change after the *Sorensen* decision had been called to Congress' attention,

> "* * * the inaction of Congress is persuasive that it accepted the rule of the Sorensen case as correct and desired that, in so far as it did not settle the problem, it be worked out by the courts as particular cases arose. Certainly there was no indication that the prohibition against censorship was absolute or that there was complete and absolute immunity." (*Id.* at 59)

According to the testimony of National Association of Broadcasters' counsel Don Petty at the Hearings after the *Port Huron* case, the rule of the *Sorensen* case had been accepted as binding by the industry:

> "Everything was going along pretty well, and broadcasters were deleting libelous material. No one was being damaged, as far as I know, and suddenly this Port Huron decision comes along and changes the whole law." (Hearings pursuant to H. Res. 691, 80th Cong., 2d Sess., at p. 73. See also *id.* at pp. 70 and 71.)

And to the early history of congressional rejection of immunity proposals there was added, in 1948, the rejection of the entire *Port Huron* doctrine when the Special Committee reported to Congress the FCC's assurance that it would not enforce this doctrine (H.R. Rep. 2461, 80th Cong., 2nd Sess.). Indeed, it can be said that the Commission "acquiesced" in the congressional rejection of *Port Huron*.

The Government points out in its brief that the original version of the Federal Radio Act first passed by the Senate contained an immunity provision and that the Conference Committee struck this "entire exemption" (Govt. Br., pp. 17-19). Since that time many different efforts have been made to persuade Congress to legislate immunity—including efforts by the Commission itself. All these bills failed to pass. This, we submit is convincing evidence that Congress did *not* wish to immunize broadcasters for libelous utterances. As the Court of Appeals for the 3rd Circuit said in *Felix* v. *Westinghouse*, 186 F. (2d) 1, 5, 6 (C. A. 3, 1950), dealing with another provision of Sec. 315 which Congress has similarly refused to change: "All of this legislative history would be reduced to wholly meaningless shadow boxing if it were the fact that Sec. 18 of the Radio Act as originally enacted included" the provision which was subsequently urged as an amendment. "We must accordingly take the statute as the Congress intended it to be and leave it to that body to resolve the questions of public policy involved in the one construction or the other." (*Ibid.*)[2]

The amendment of Section 315 in 1952 did not, as *amicus* National Association of Broadcasters claims (N.A.B. Br., p. 29) demonstrate "acquiescence with the Commission's interpretation" under the *Port Huron* doctrine. The Conference Committee which rejected the House immunity amendment at that time specifically said (H. R. Rep. 2426, 82 Cong., 2nd Sess., p. 21):

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[2] See Friedenthal and Medalie, The Impact of Federal Regulation on Political Broadcasting: Section 315 of the Federal Communications Act, 72 Harv. L. Rev. 445, 480 (1959): "* * * Congress did not intend to absolve licensees from liability for defamation under state law". The authors take the position that Section 315 creates no immunity and discuss the desirability of adopting an immunity amendment (at p. 480 ff).

"* * * The Committee of Conference agreed to omit the provision with respect to liability of licensees in civil or criminal actions * * * because these subjects have not been adequately studied by the Committees on Interstate and Foreign Commerce of the Senate and House of Representatives. The proposal was adopted in the House after the bill had been reported from the House Committee. The proposal involves many difficult problems and it is the judgment of the Committee of Conference that it should be acted on only after full hearings have been held."

The National Association of Broadcasters now asks this Court to conclude that Congress intended to accomplish through inference what it expressly rejected in explicit terms and for stated reasons.

Finally, the argument that FCC interpretation of Section 315 has been "unvaried and consistent" for "some thirty-one years" (NAB Br., p. 14) is not consonant with the facts. Administrative interpretation of Section 315 by the Commission has been characterized by inaction, confusion and uncertainty.

As shown in our main brief (at p. 15 ff.), the history of Section 315 has been almost chaotic. After years of non-objection to the *Sorensen* rule, on which the industry had relied, the FCC tried unsuccessfully to amend the law. Then—in *Port Huron*—it interpreted the law contrary to *Sorensen*. But *Port Huron* was no sooner written than the views of the *Houston Post* court and the Special Committee caused the FCC to retreat from its doctrine. Then—after having assured Congress that no regulation embodying *Port Huron* was in effect—it purported in Matter of *WDSU Broadcasting Co.*, 7 Pike & Fisher Radio Reg. 769 (1951) to breathe new life into one aspect of *Port Huron*. But contrary to its position in 1948, it did not say

categorically in 1951 that Section 315 immunized broadcasters.

Certainly the N.A.B. position does not seem to have been the view of the Commission which has often noted the confusion on this subject. Thus, in 1948, Chairman Coy said:

> "There has been some question as to what Sec. 315 meant for many years. The problem of whether or not a broadcaster had the right to censor for libel under Sec. 315 of the Act has been with us since 1927 * * *" (Hearings pursuant to H. Res. 691, 80th Cong., 2nd Sess., at p. 12.)

Although Chairman Coy did not claim that *Port Huron* "has relieved the confusion" he hoped that: "it may contribute to the final determination of the question" (*Ibid.*). *Port Huron's* contribution to determination of the question in 1948 was, as we have seen, for the Commission to agree not to follow the doctrine.

And later, in 1951, in the period following the FCC promise to the Select Committee not to enforce *Port Huron*, Chairman Coy said:

> "The Commission, shall I say, has overlooked the Federal statute a bit because of the confusion about it, but it seems to me it is time the Congress was clear as to what Sec. 315 means. If it says "no censorship," does it mean there is no censorship, or does it mean that you can censor if you are liable under State laws for libel and defamation? *I am making no recommendations about it here because it is not included in the legislation.*" (Italics ours.) (Hearing before House Committee on Interstate and Foreign Commerce on S. 658, 82d Cong. 1st Sess., at p. 134.)

There can be no acquiescence in such a course of inconsistent administrative interpretation as the Commission has followed over the years.[3]

Congress has not acquiesced in the present FCC interpretation of Section 315. It has not *failed* to act—it has acted by clearly rejecting the construction of Section 315 which has been adopted by the Court below.

C. The alleged "preemption of the field"

Respondent and the National Association of Broadcasters urge affirmance on the ground that we have here a federal "preemption of the field" and that therefore no state law of defamation can operate. (Resp. Br. p. 2; N.A.B. Br. p. 5 et seq.). The theory seems to be that preemption flows automatically from the fact of federal regulation of broadcasting. (See *e.g.* N.A.B. Br. p. 5 et seq.) This, of course, proves too much; on this theory, all state law relating to private rights in the broadcasting field would be supplanted. *Radio Station WOW* v. *Johnson*, 326

[3] *Cf. De Sylva* v. *Ballentine*, 351 U. S. 570 (1956) (administrative ruling based on "a decision that there is substantial doubt over the question, rather than the result of a confident interpretation of the statute" is not entitled to weight); *Davies Warehouse* v. *Bowles*, 321 U. S. 144 (1944) ("* * * The administrative ruling in this case was no sooner made than challenged"); *Federal Power Commission* v. *Panhandle*, 337 U. S. 498 (1949) (failure of an agency to assert a power for 10 years indicates that the agency did not think the power existed); *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1 (1932) (* * * the Court is not bound by an administrative construction, and if that construction is not uniform and consistent, it will be taken into account only to the extent that it is supported by valid reasons * * *. Moreover, ambiguous regulations are of little value in resolving statutory ambiguities"); *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269 (1939); *Sanfords Estate* v. *Commissioner Int. Rev.*, 308 U. S. 39 (1939); *Fishgold* v. *Sullivan Drydock and Repair Corp.*, 328 U. S. 275 (1946); *NLRB* v. *Globe Automatic Sprinkler Co.*, 199 F. (2) 64 (C. A. 3, 1952).

U. S. 120 (1945) and *Regents of the University System of Georgia* v. *Carroll*, 338 U. S. 586 (1950) demonstrate the fallacy of this approach. Thus in the latter case, this Court upheld a state created cause of action for breach of a contract against a broadcast licensee although the Federal Communications Commission had required the licensee to disavow that same contract as a condition of keeping its license (see Petitioner's Br., p. 33).

We think the primary answer to the argument of "preemption" is that Congress did not choose to legislate immunity. From 1927 on not only did it fail to speak with the "drastic clarity" referred to by Mr. Justice Frankfurter in *Bethlehem Steel Co.* v. *New York Labor Relations Board*, 330 U. S. 767, 780 (1947) (see Petitioner's Br., p. 31) but it consistently rejected immunity legislation—in the context of consistent Congressional and, until recently, Federal Communications Commission belief that immunity did not otherwise exist.

In answering the FCC argument in favor of preemption in 1948, the National Association of Broadcasters, in its *Port Huron* brief, *supra*, p. 4, at p. 61, said:

> "The public interest with which the Congress was concerned was * * * the equal treatment of candidates for public office in the use of broadcasting facilities. To safeguard that interest it is not necessary to abrogate large segments of the civil and criminal law of all of the 48 states."

We agree that Section 315 is an equal opportunity statute. It was not designed, as the N. A. B. now says it was, to fulfill "the overall public interest concept of letting the people know" (N.A.B. Brief, p. 13). If it were, Congress would not have deliberately stricken the "common carrier" obligation first proposed (see Government Brief at p. 16 *et seq.*) and would not have explicitly stated that *no obligation* exists to carry any political candidate's speech.

The National Association of Broadcasters asserts that the Federal Communications Commission imposes on broadcasters an obligation to carry such programs in the "public interest" (N.A.B. Br., p. 19 *et seq.*). We need not now discuss whether or not this FCC policy is itself consistent with that part of Section 315 which specifically states that the licensees are under "no obligation" to carry such broadcasts. If there is any obligation imposed on licensees to carry political broadcasts it is certainly not one derived from Section 315. Thus, if it is sound to rule that, in the public interest, licensees must carry a fair share of political candidate programs, then obviously licensees with respect to such programs, like all other programs not broadcast under Section 315, have not only the right but also the obligation to delete defamation.

The *amici* appear to be arguing that equality of political debate is impossible unless the libel laws are set aside. One wonders how it was possible to conduct political campaigns before the age of radio and television, when no one thought that any medium of communication was immune from the law of libel. Nor are the other media of communication today immune from state libel laws. The inhibiting effect of the libel laws on political debate seems greatly exaggerated by our opponents. Clearly what Congress had in mind in enacting Section 315 without an immunity provision, and in its continuous refusal to enact such a provision was that equal treatment of candidates and the libel laws can co-exist. It was within the framework of the law of defamation that Congress sought to equalize rights of political candidates to the air.

In the authorities relied on by the *amici* clear federal policy would have been directly frustrated if the state law had been applied to the situation. Here there is no such conflict. As the National Association of Broadcasters said of *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173

(1942), in its Port Huron brief in 1948 (*supra*, p. 4 at p. 61), "In this view (of the object of Section 315) the *Sola* case falls into its proper place * * * no conflict has been shown * * *."

O'Brien v. *Western Union Telegraph Co.*, 113 F. (2) 539 (C. A. 1, 1940) relied on by the National Association of Broadcasters (N.A.B. Br., p. 39) is patently inapplicable to radio and television as the N.A.B. itself pointed out in its 1948 brief (*supra*, p. 4 at 62). The degree of regulation of the telegraph company as a common carrier, as well as the wholly different extent and effect of publication by telegraph—all serve to render that decision no guide to resolution of the issues of this case.

There is no federal policy to free political contests from the law of libel. The only federal policy which the statute reflects is that of equality and that is not threatened by the petitioner's construction of Section 315.

Equally inapplicable is the *Oliver* case (27 U. S. Law Week 4077) relied on by National Association of Broadcasters (NAB Br., pp. 60-2), where an Ohio anti-trust law prevented the contracting parties from carrying out the federal law which directed them to bargain. It is alleged that this is similar to the present case because "the licensee is here under the compulsion of federal mandate to air the speeches of duly qualified political candidates" (*id.* at 61). But, we submit, this completely begs the question which is whether Sec. 315 compels the licensee to "air" *defamatory speeches.*

The purpose of Sec. 315 is to compel the licensee to give *equal time.* Any state law that prevented the carrying out of that mandate, would, of course, have to yield. The field occupied was availability of equal time for political candidates, not circulation of libel with impunity.

D. The Government's suggestion that this Court not resolve the immunity question

The Government suggests that this Court "might deem it appropriate" to resolve only the question of "censorship" herein presented and, without passing on the question of immunity, to remand the case to the Supreme Court of North Dakota (Gov't Br. p. 4). However, in its Memorandum for the United States as *Amicus Curiae* filed in support of the Petition for Certiorari, the Government said (at pp. 1-2):

> "This case squarely presents the questions of whether the statutory prohibition against censorship . . . extends to libelous and slanderous language or language which might reasonably be thought to be defamatory and, if so, whether the licensee is thereby rendered immune from liability under applicable state law. Resolution by this Court of these questions would dispel the uncertainties which have existed . . . (and) is particularly needed in view of the increasing use of broadcast facilities by candidates for public office . . . the consequence has been that great uncertainty *which can only be finally resolved by this Court* has existed in this area" (italics ours).

The Court below was of the opinion that

> "The question presented in the instant case is whether under Section 315 *supra* the defendant WDAY is immune from damages for broadcasting the libelous matter contained in the speech of A. C. Townley" (R. 39).

We agree with the Court below that the question of immunity is the central issue presented by this case regardless of what this Court should decide on the censorship question. While we believe that Section 315's prohibition of "censorship" does not preclude deletion of libel,

it is our contention that, even if it does, Section 315 does not in any event confer immunity. Respondent and the *amici* maintain, on the other hand, that under Section 315 *federal* immunity necessarily follows from no right to delete libel and the Supreme Court of North Dakota has so held. If the holding below is correct that there is federal immunity then the North Dakota law is irrelevant. If this Court decides to remand the case then we submit it will necessarily have ruled that there is no federal immunity since an inquiry into the North Dakota law becomes pertinent only if it is held that the Court below was in error in finding that such an immunity existed. We do not, therefore, agree with the Government that it would be "appropriate" for this Court to remand without deciding the immunity question. (*Cf. Indiana ex rel. Anderson v. Brand*, 303 U. S. 95 (1938).)

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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